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V. J. Stricker

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VOLUME XVII OCTOBER, 1945 NUMBER 3

SOME SUGGESTIONS AS TO ORAL ARGUMENTS AND WRITTEN BRIEFS IN THE SUPREME COURT OF MISSISSIPPI

*W. G. Roberds**

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The hope of making some suggestion of practical benefit to the members of the bar has caused me to comply with the request of the Editors of the *Law Journal* to write this article. It has been prepared, in form and substance, with that hope in view.

I. Oral Arguments

1. *Request—necessity for:* Any lawyer engaged in the appeal on either side is permitted to argue his case orally before the court, provided he makes such desire known to the court when the case is called, whether

*Associate Justice, Supreme Court of Mississippi, and former professor of law, University of Mississippi.

his opponent argues or not. A request for oral argument, if desired, is usually, and properly should be, contained in the brief, so that opposing counsel will have notice, with opportunity to be present. However, such written request in the brief is not a prerequisite to the right to make oral argument if proper request is made orally on the call of the case; and, although the brief contains such notice, it is nevertheless necessary that announcement be made on the call, else the court will understand oral argument is not desired. However, even where no request is made on the call, the Court may, and often has, permitted oral argument on request made after the call and during that day, in exceptional cases, such as unavoidable delay of counsel in reaching the Capitol, the argument to be so placed as to cause the least disruption of the docket and the least inconvenience to the lawyers engaged in other cases, and usually at the heel of the docket for that day.

2. *Time Allowed:* Cases are called in the order shown on the docket which the Clerk has previously mailed to all attorneys engaged in appeals set for the day specified. When the first attorney rises to argue the case, the presiding Justice will ask what time is desired for argument on each side. As much as thirty minutes to the side, making one hour for the case, will be allowed as a matter of course if counsel request that much time. However, attorneys frequently do not want that much time, in which case the time agreed upon by them will be allowed. But more than thirty minutes to the side may be granted by the Court where more time is needed to cover the case; in this event, however, the argument will be postponed to the heel of the docket for that day, so as not to detain attorneys in other cases while the longer arguments are being made. If more than one attorney argues for the same side, the time allowed for that side may be divided by the attorneys as they wish. However, since appellant has the opening and closing arguments, it is expected that the opening argument for appellant will present all of his contentions, so that counsel for appellee may reply thereto.

3. *Physical Mannerisms:* The style and manner of making arguments are for the individual attorney, and will be determined by the usual habits and manners which he has formed. Naturally lawyers cannot change these habits overnight. However, it has been noticed that many lawyers do succeed in adopting a quieter and less demonstrative manner than when arguing to jurors. Of course, this manner is preferable before a supreme court. Logic, reason, conciseness and clearness of statement are more helpful than physical gymnastics. However, it is certainly not recommended that a lawyer undertake to change life-long habits if thereby, during his argument, he is conscious of this effort to the extent of detracting from a thorough and lucid statement and analysis of the facts and issues of his case and the legal principles applicable thereto. An advocate, as with other speakers, is fortunate if he can "lose himself in his discussion."

4. *Objects:* Judge V. A. Griffith, in an address on this same subject, made an appendix hereto,[1] stated the objects of a brief to be, first, that this court may be aided by the special learning of the lawyer and his study of that particular case; second, that the advocate may present the law and the facts as strongly and persuasively as he can while maintaining fidelity to the facts in the record and the law applicable thereto, and, third, to aid the Judge to whom the case may be assigned for study to present the facts and law to the other Judges in conference. The first two objects apply with equal, and the third with little less, force to oral arguments. And, as to the latter, a further effect is better to enable the other Judges to grasp the facts and legal principles and have them in mind when the case is presented in conference by the Judge charged with the record.

5. *Introductory Statement:* At the very beginning, and as quickly as possible, counsel should get before the court the questions involved on the appeal. Many lawyers make the mistake of proceeding at first to state their conception of the facts, even to detailing the testimony of the witnesses, when the Judges do not know the nature and result of the proceedings in the lower court, the errors it is contended were committed there, nor the questions to be passed upon by this court. It should be borne in mind that this is a court of review. It passes only upon the correctness of the proceedings in the lower courts. These may be helpful illustrations of introductory statements:

(a) "Appellant Thompson was indicted for and convicted of the murder of one Stevens and sentenced to the state penitentiary for life. We urge on this appeal, first, that the evidence wholly fails, and is entirely insufficient, to prove him guilty of murder, or any other crime; second, that the court erroneously admitted in evidence a supposed confession of Thompson; third, that error was committed in admitting in evidence an alleged dying declaration of Stevens; fourth, that five of the jurors who served were drawn from by-standers instead of the regular jury box; and, fifth, that the district attorney, in his closing argument made certain improper, inaccurate and inflammatory remarks to the jury. We, therefore, contend that the case should be reversed and appellant discharged, request for a peremptory instruction having been made in the lower court, but if he is not discharged, then that the case be remanded for another trial."

(b) "Jones sued Smith in the circuit court of Lafayette County for damages for personal injuries sustained by Jones in an automobile collision. Jones was driving one car and Charley Warren the other. Jones claims his injuries were caused by the negligent driving of Warren as the servant of Smith. Jones recovered a verdict and personal judgment for ten thousand dollars. Smith appeals. It is our contention on this appeal,

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[1]See end of the article for the reprint of the address by Judge Griffith, *infra* p. 122.

first, that the negligence of Jones was the sole cause of his injuries; second, that Warren was not the agent of Smith; third, that instruction No. 2 granted to Jones was erroneous in that it assumed, and in effect told the jury, that Warren was negligent and was the servant of Smith at the time of the accident. Other errors are assigned and argued in the brief but we present now only those stated."

(c) "This is an appeal by Mrs. Celeste Evans from a decree of the chancery court of Hinds County dismissing, for lack of jurisdiction, her bill for divorce and alimony against Thomas J. Evans, the appellee. The only question presented on this appeal is whether the court had jurisdiction of the subject matter and the parties."

Upon hearing such introductory statement the Judges are able to grasp immediately the proceedings and result in the lower court and the questions to be passed upon in this court. They are able to tie the arguments to these questions. Of course, more complicated cases may call for a more lengthy preliminary statement to get the setting and questions before the court. That depends on the case.

6. *Statement of Facts and Arguments:* After this the attorney can proceed with his discussion. The case may, or may not, call for a statement of the facts. Such statement may, or may not, be pertinent to the issues involved. Case (a) above would call for such statement and arguments thereon; as also would case (b) insofar as the evidence bears upon Jones' negligence being the sole cause of his own injury; case (c) would require a statement of the facts pertaining to the residence of the parties, etc., and all facts bearing upon jurisdiction, but not on the merits of Mrs. Evans' claim for divorce and alimony. The issues in that case might be presented by the pleadings, in which case only the allegations in the pleadings need be given. In other words, a lawyer should always state his case, but the extent of his statement of the evidentiary facts depends upon the issues to be decided. However, if any point at issue requires a statement of the facts, that point should be presented first and the facts be then disclosed to the court, so it will have the benefit of these facts in thinking upon the questions in issue.

Where it is necessary to state the facts, whether generally or as bearing especially on some particular point, counsel should be thoroughly familiar with the evidence and the facts and make as clear, concise, logical statement as he can. He can say, "These facts are not disputed," giving them; "these are in dispute but the evidence of appellant is much stronger than that of appellee"—briefly outlining it. He may need to state only the facts relating to some point, or if he has given a general statement, this may also cover the point. He should avoid repetition.

As he takes up each point, after stating the facts necessary to an understanding of that point, he should clearly state his legal propositions ap-

plicable thereto. He can then refer to the case, or cases, sustaining him, telling the court what they hold and the applicable rules of law announced therein. He should endeavor to present only cases in point. One or two cases in point are worth more than a multitude of non-point cases. He will have no time to ramble. No cases are to be read to the court. If a case contains a statement directly applicable to the legal proposition urged, it is permissible for counsel to read a short excerpt therefrom, preferably from his brief rather than from the book, and if the question is the construction of a statute the pertinent part of the statute should be read. It would cause great inconvenience and confusion in the court room to permit each attorney to bring thereto the books containing the cases he thinks support his contentions. This is not permitted.

Appellee, in reply to appellant, may or may not take issue on the facts. If he does take issue, he should state in what respects and urge his version of the evidence, and then proceed to reply to the contentions of appellant. Appellant's attorney will then have a reply to the argument of appellee, not to exceed the total time which appellant has been allowed.

In all arguments the questions should be separated and distinctly argued. Clear, concise, logical arguments are naturally much more helpful to the court than those that are rambling, confused and jumbled. That means an attorney should not undertake to make an oral argument unless he is thoroughly familiar with all the facts and questions involved in his case and the legal propositions applicable thereto. It is pertinent here to state that no attorney need fear that the court, when it considers the case in conference, will not have the pleadings, issues, facts and legal questions thoroughly in mind. Under the system in use cases are assigned by one of the secretaries. The assignment is by rotation as the cases appear on the docket. No judge has any choice. The judge to whom the record is so assigned reads it thoroughly, has in mind all issues and facts and the respective contentions and authorities relied upon by each, and he gives this fully and fairly to all the other judges in conference, and there is a full and frank discussion of the issues and the law. The record is then assigned to another judge, who also makes a thorough study of the facts, issues and legal propositions involved and this judge makes another report of his conclusions and there is a further discussion. So that each record is studied by at least two judges and sometimes by more, and even all six, of them.

7. *Questions:* (By the Court) It is pertinent to say, in this connection, that the court as now constituted is not a question-asking court. When questions are propounded to counsel during the arguments they are for the purpose of getting a point, or the contention of counsel thereto, or some doubtful fact, or legal proposition, more clearly before the Judge asking the question. That does not mean, however, that some Judge may not ask counsel a searching question which will disclose counsel's knowledge, or lack of knowledge, of his case and the law applicable thereto. No

attorney need fear embarrassment by a question if he knows his case and has reasonable grounds for sustaining his contentions.

II. Briefs

1. *Time Within Which to File:* Rule 7 requires appellant's brief to be filed not later than twenty-one days, appellee's reply not later than ten days, and appellant's rejoinder not later than three days, prior to date the case is set for argument.

2. *Physical Form:*

(a) The members of this court necessarily do much reading. It is necessary to conserve eye energy as much as possible. Therefore, Rule 7 (3) requires briefs to be typewritten or printed, and, if typewritten, to be in black, non-copying ink, double-spaced, on white paper. That combination is considered best for reading.

(b) The best form for the brief, in my opinion, is that of a book, opening from right to left, with stiff backs. However, some attorneys use for backs the usual abstract, or legal document, covers carried in their offices, and these, even though flexible, are very good for the purpose. But the pasteboard backs are better. They do not have to be bound by a printer, although it would appear that the cost of such edge binding would be very small. The binding can be done in the lawyer's office by use of brads of suitable length, inserted through and bent back, or, better, by the use of a Bates, or other like, fastener. The book-form brief lies flat and fits back of the record and it is more convenient for use by the Judge who is handling it. Most of the briefs are fastened at the top and rolled up or folded, frequently making a bulky, hard-to-handle bundle, and the sheets are always curled out of natural shape. The rules do not prescribe the size paper, so that in the book form either the regular large letter, or legal size, paper may be used. If the brief is short, the large letter size is better; if long, the large legal size is preferable, because, of course, the larger the paper the fewer sheets are required. If the brief is printed, it will naturally be in book form and even smaller than regular letter size paper, but it is hoped that the book-form will be more and more adopted where the brief is typewritten.

3. *Arrangement:* The first, or opening page, of the brief should contain the style and number of the case, on whose behalf it is filed, and the name and address of the attorneys, in such form as this:

"IN THE SUPREME COURT OF
THE STATE OF MISSISSIPPI

John Doe.....Appellant
v. No. 38,323
Richard Roe.....Appellee

BRIEF OF APPELLANT

By Blackstone & Marshall, Attorneys,
Meridian, Mississippi."

The next page, or pages, if needed, should contain a topical, or general subject index of the contents of the brief, the pages covered by each subject, including the points urged in the brief, with a concise statement of the contention under that point and the legal proposition invoked in behalf of the contention, and each legal proposition should be immediately followed by a list of the authorities, with the book and page where found, supporting the announced legal rule. Such outline should contain, in the right margin thereof, each page of the brief where each cited authority is mentioned or discussed. For instance, in the Jones-Smith case above, a sample of this page might be:

"GENERAL INDEX TO BRIEF

I.

INTRODUCTORY STATEMENT 1

II.

OUTLINE OF PLEADINGS 2–3

III.

STATEMENT OF FACTS 4–7

IV.

ARGUMENT AND AUTHORITIES 8–30

POINT 1. The proof in this record shows conclusively Jones' injuries resulted solely and alone from his own negligence. In such case there can be no liability upon Smith for such injuries.

Thompson v. Cassedy, 181 Miss. 619, 179 So. 551 10-13-17

(Listing all other authorities under this point)

POINT 2. The evidence shows, without dispute, that Warren was not the servant of Smith and was not at the time of the accident engaged about the business of Smith, but, on the contrary, was on a private mission of his own.

(Listing authorities)

Such an outline enables the Judges to find quickly the pages of the brief where the different subjects and points are discussed as they need to refer thereto in considering the case.

Some lawyers, in addition to this outline, list upon a separate page, in alphabetical order, all of the cases cited in the brief and each page of the brief where the case is mentioned. For illustration:

Beard et al. v. Williams,
172 Miss. 880, 161 So. 750_____11-13-17

Great Atlantic & Pac. Tea Co. v. Davis,
177 Miss. 562, 171 So. 550_____13-23-26
(And so on)

This practice is commended. It is of much aid to the court. The Judges frequently need to refer again and again to some case or cases. This enables them to run quickly down the list and find the book and page of that case rather than wade through the brief and find it somewhere in the body thereof. It is not amiss here to caution attorneys to be sure to give the correct book and page where the cited case can be found. The Judges are pressed for time. It is annoying to find that a citation is wrong, necessitating that the Judge himself try to run it down and find the report.

(a) *Introduction:* What is said above as to oral arguments also applies to briefs. See also suggestions by Judge Griffith hereto appended at end of article.[2]

(b) *The Pleadings:* If no point is made on the pleadings there is no need to set them out, unless by so doing a clearer understanding of the issue can be had. For illustration, cases (a) and (b) above would not require any detailed statement of the pleadings; case (c) would so far as they pertain to jurisdiction of the parties and the subject matter.

(c) *Statement of the Facts:* Much of what has been said as to oral arguments applies here and will not be repeated. See also Judge Griffith's observations under this head.[3] It might be noted that some attorneys, as a part of the statement of facts, take up the tesimony of each witness, giving a summary thereof, and follow this method through the entire case. This may be of aid to some of the Judges and I do not condemn it, but, so far as I am concerned, it is of little help. In the first place this method doubles or trebles the length of the brief, and most briefs are much too long; and in the second place, a recital of what the witnesses have said is a "twice-told tale" and is not nearly so interesting as the reading of what they say themselves and their manner of saying it. However, it does have the merit of enabling a judge to glance over the summary of the evidence of each witness, thereby refreshing his memory after he has read the testimony itself. For this purpose, where this method is adopted, the topical index should give the names of the witnesses and pages of the brief where the testimony is summarized, to aid the Judges in finding it. Of course,

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[2]See *infra* p. 122.
[3]*Infra* p. 122.

lawyers should summarize the testimony, and even briefly quote it, where pertinent to and bearing directly upon the question under discussion.

I wish here to impress upon lawyers the importance of showing in their briefs the page of the record which supports the statement of the facts as made by them, including references to testimony, pleadings, exhibits, judgments, orders—wherever a statement is made in the brief which is based upon the record.

(d) *Argument:* Next comes the argument. The points should be taken up as outlined, or such of them as counsel may desire to argue, stating briefly the point and the facts pertinent to it unless the facts have already been stated. The case should determine the method. Rather than give a blanket summary of all the evidence, it will have more life and point if the parts pertinent to a certain point are set out and analyzed when discussing that point. For instance, in the Jones-Smith case, in trying to establish the fact that Jones' negligence was the sole, proximate cause of his own injury, counsel will need to outline the testimony of the witnesses bearing upon the negligence of both parties, describing their opportunity of observance, their nearness to the accident, whether they were passing the scene in other vehicles or standing by, whether the time was day or night, the condition of the weather, and other factors. In this connection, inquiry has been made whether lawyers should quote in their briefs the testimony of witnesses. This practice is commendable where the testimony is especially pertinent to and bears directly upon the question under consideration, or is given by a key witness, upon whose testimony that particular fact must depend, and where it is not quoted at too great length.

Counsel will then proceed to a discussion of his authorities, especially those most similar in fact and legal principles to the case at bar. It is helpful to develop briefly just how the legal proposition invoked arose in the cited case. And it might be stated that it is a good practice to quote from the decided cases where such quotation is short and especially applicable to the point. This is helpful to the judge who is presenting the case. But judgment should be exercised in this respect. The brief should not be unduly lengthened and the quotations should be confined to those which go to the heart of the point under discussion.

The points should be separated and headed through the body of the brief, as they are discussed, in the order that they appear in the general outline. We have had briefs from sixty to a hundred pages, or more, which contained no headings or separation of subjects—just running from one idea to another, frequently mixing them and often reverting again. The questions are separately presented in conference, which means, in that kind of brief, that the judge presenting the case must dig through the brief and himself try to separate the points and assemble under each the reasons, arguments, legal principles and authorities supporting the contention.

Each attorney should, of course, have a copy of, and be familiar with, the rules governing the practice in this court which have been, or may hereafter be, prescribed. The suggestions contained herein are to be considered in connection with those rules.

Finally, it might be observed that a logical, lucid, learned argument, oral or written, in this court, is perhaps the best evidence of the greatness of a lawyer as an advocate and of his ability to serve his client and aid this court in the discharge of its important and sacred duties.

APPENDIX

Suggestions For The Preparation of Briefs[4]

There are three objects in the proper preparation and arrangement of a brief, assuming that the lawyer knows his case and the law applicable thereto, so far as the merits of the case are concerned. The main object is that the appellate court may be aided by the special learning of the lawyer in the case, which he is presumed to have derived from a study of that particular case for some time, accentuated by the interest he has in rendering his best service to his client. The second object is, of course, that he may in the interest of his client present the law and the facts as strongly and as persuasively as may be, while at the same time maintaining a true fidelity to the facts of and within the record, and the law applicable thereto. The third requisite, and one which is often overlooked, is that the brief may be so prepared and arranged that the judge or judges who read the record and the briefs, before the conference upon the case, may be able, by the aid of the briefs, to put the case before the associate judges in conference in such a way as that no point touching a material fact or issue will be overlooked and that no case in point would fail to be called to the attention of the associate judges.

This latter is hard to do with some of the briefs which are filed. The material points are not separately analyzed; the authorities are scattered throughout the brief without any attempt to gather them in such a way that the judge or judges who are putting the case to their associates may reach them readily; the facts and the law are often intermingled in such a fashion that it is difficult to tell precisely what is being urged, and whether of law or of fact. Instead of carrying its own analysis, as a brief ought to do, the judges or some of them must sometimes take the brief and by marginal notes on it, or by notations separately made by the judge or judges, try to point out and indicate what the points are, and, by these marginal or separate notes, to get it in such shape that it can be put in conference, point by point. But a brief so constructed as to require this to be done entails such a large amount of additional labor on the part of

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[4]This is a reprint of an address made by Judge V. A. Griffith, Associate Justice of the Supreme Court of Mississippi, on August 1, 1939.

one or more of the judges that sometimes it must inevitably be true that neither they nor their associates will get the full or precise import of what is being urged upon the court.

For these reasons, a brief should be arranged in approximately the following manner:

On the first or opening page of the brief there should be written the style of the case, its docket number and the statement in whose behalf the brief is filed, and this is to be immediately followed by a

Topical or Subject Index

This index is a concisely stated summary of each of the law points which the brief maker will urge before the court. Point I will be a concise statement, in one paragraph, if possible, of what that point is, and immediately following thereunder will be a list of every case or the citation of every text or statute which the brief maker is relying on in support of that point. Point II briefly stated will follow, and all the cases, texts or statutes which will be relied on in support of that point will be indexed thereunder, and so on through all the points. The index under each point will show the style of the case, the book and page where reported, and the page or pages in the brief where that case will be subsequently mentioned; and the same as to textbooks and statutes.

In referring to Mississippi cases, the official reports must be cited, since these are the reports which the Court regularly uses and must cite in the opinions. Unless the brief uses the official reporter citations, one of the judges will be obliged to make the translation, and this is a clerical work which the brief maker has no right to call on the judges to do.

Introductory

Beginning at the top of the next page following the close of the index, the style and docket number, and in whose behalf the brief is filed, may again be stated, and this is followed by a brief introductory giving the nature of the case, as for instance: "This is an action of ejectment, wherein the principal point in controversy is the question of adverse possession," or "This is a suit to set aside an alleged fraudulent conveyance, and among others the defense was that the grantor was not indebted to the complainant." This is not to be a statement of the case, for that feature comes later, but is only to give the court a quick glance at what the case is about, and, save in rare cases, ought not to be in more than one or two short paragraphs.

The Pleadings

The introduction is followed by a concise outline of the pleadings, if any point is to be made in regard to the state of the pleadings. More often than otherwise no point arises out of the pleadings, in which case the plead-

ings feature may and ought to contain only a brief reference to the pleadings, with the statement that there is no controversy under this head. At this point there should be stated the gist of what was done with the case in the trial court.

Statement of The Facts

Next following the pleadings feature is the succinct statement of the facts of the case, so far as essential or proper to a correct understanding of the questions presented for determination. This is not to be done by any extended question and answer quotation from the testimony, but by a clear, concise and accurate narrative of the outstanding, pertinent facts, giving only such details as illustrate or disclose the precise import of the leading facts; and always there should be inserted the page or pages of the record which support or bear out each item of the assertion of the facts. Sometimes questions and answers may be quoted from the record, but this should be done only when the particular questions and answers go at once to the heart of the case, or of the particular point and are not lengthy

While the statement of facts should not extend to a greater length than necessary to put every really important and pertinent fact before the court, yet, above all else, the statement of the facts should be accurate, and inaccuracy may occur in omitting a fact or facts which are of importance. Lengthiness is not to be avoided at the expense of accuracy; and whatever the length, the statement must be true to the facts, for if the court finds that the statement of the facts is distorted or misleading when checked and compared with the record, it may cause a serious loss of confidence in the brief as a whole. The statement should pursue an orderly and logical plan, and when this is done length is not in itself objectionable if the mingling of material and immaterial facts, and verbosity or discursiveness, are avoided.

The Argument

The statement of the facts is then followed by the full argument, point by point, according to the points as shown in the topical index. The authorities cited in the index are here taken up, and their application to the facts is shown; and it is of valuable aid, in most cases, to quote pertinent excerpts from the opinions in the cited cases and from the text books,—provided the quotations are not too lengthy; and provided, of course, the quotations are not misleading when taken apart from the remainder of the opinion or text. Frequently, in order to make the quoted words or holding of the Court intelligible it will be helpful to state the facts of the cited case. This statement should be concise and clear, setting forth accurately only such of the facts as bear on the proposition of law for which the case is cited. This course is of particular service for the work in conference, when the quotations from the cases and texts may be read to all the judges in the convenient form furnished by the briefs, and where, when a case thus

cited seems particularly in point, the book itself may be taken down and read by or in the hearing of the associate judges.

Sometimes the facts of a case will permit that instead of stating all the facts before entering upon the argument, the several points of law may be taken up in the order shown in the topical index, and the facts as applicable to each point may be stated thereunder and the argument on the law addressed thereto, and thence in the same order through all the points, thereby separating the statement of the facts according to the several law points. When this can be done, without detriment to the continuity of the argument, and without repetition, it is often more helpful to follow this course, particularly when some one point might be decisive of the whole case.

Next following the main argument, there may be the argument in answer to the contention of the other side as made in the trial court, and by way of anticipation of what the other side will probably say in the appellate court; or if the brief is for the appellee or is a reply brief by appellant, an argument in response to that contained in the previous briefs. Whenever in any reply brief, supplementary points of law are relied upon, these should be carried back into the topical index together with the subjoined index of the authorities in support thereof in the same manner as in regard to the original points of law.

Conclusion

Such additional features than those above-mentioned may be incorporated according as counsel may deem advantageous, and there is the concluding summary in such terms as the brief maker may consider appropriate and helpful.

It is sometimes supposed that appellate judges, or some of them, object to long briefs. This depends on the character of the brief and whether it bears evidence that the brief maker has thoroughly studied his case both on the law and the facts,—whether in what he says he is actually aiding the court instead of putting useless labor on the judges. If the case is important in the principles involved or is close upon the law the brief will be read more than once, and if not burdensomely constructed will often be sent around to all judges in turn so that they may read it in advance of conference and sometimes after conference, and the judge who writes the opinion will want everything in it right before his eyes in that final stage of its consideration. Thus the brief and argument should be convenient not only, but inviting to its repeated consideration and study. A brief too long, whatever else may be said about it, is not inviting. But long briefs are necessary in some cases, and at last, counsel must have the privilege to determine for himself how lengthy his brief shall be.

The above suggestions follow closely upon the outline set forth in Rule 27 of the Rules of the Supreme Court of the United States, and are

founded upon the same reasons, as learned through the lessons of long experience in the work of appellate review. But what has been said herein are suggestions only; the Supreme Court of Mississippi has never adopted any mandatory rule, and does not expect to do so at any early date. Paragraph 2 of our Rule 7 is advisory and not obligatory. Counsel are at liberty, therefore, to adopt only such parts of the above suggestions as they may desire, but it is hoped that, at least, the feature of the topical and case index will soon come into general use.

The article by Judge W. D. Anderson in the *Mississippi Law Journal* for February, 1930,[5] when available to counsel may be read in connection with and as a part of this pamphlet. Unfortunately, however, that article is now in the hands of only a few of the Bar.

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[5]Anderson, *The Brief on Appeal* (1930) 2 Miss. L. J. 263.

MISSISSIPPI SUPREME COURT DECISIONS ON ADMINISTRATIVE LAW

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At the present time by actual count the State of Mississippi has 67 boards and commissions to which the legislature has entrusted the development and carrying out of important policies.[1] Each of these functions independently. They proceed and to a certain extent combine executive, legislative and judicial functions. The courts qualify the words legislative and judicial by adding the prefix *quasi*. Perhaps it sounds better and softens the force of the words to say "quasi-legislative" and "quasi-judicial." The use of the prefix is meant to indicate that the power exercised by an administrative board or commission is not pure sovereign constitutional legislation or judicial power, of which the legislative branch of the government can not divest itself.

In some quarters it is alleged administrative boards and commissions now constitute a fourth branch of the state and national governments and constitute the most important development in modern jurisprudence, that, in the face of the fact that administrative law has not yet found a place in any Mississippi or Federal Digest. Such monumental works as *Corpus Juris Secundum* and *American Jurisprudence,* which are supposed to give us all of the law, do not digest or treat as a separate and independent subject the great and fast-growing field of administrative law.

In earlier years Administrative Law was recognized only as an exceptional and unusual form of justice with no general provision for its operation. There is no administrative code of law in existence today. The subject is not mentioned in state or Federal Constitutions or in any amendments to those constitutions.

Administrative law has seemingly grown by chance and default. It is now a vast and vital field with no clearly recognized rules or guides for either the public or the administrators.

The growth of administrative law in this state and in the nation has come about by reason of the inability of legislatures and Congress to deal adequately and satisfactorily with the many complex problems arising under a civilization so radically different from our early history. As a result the courts have found it necessary to consider the important problems concerning the organization and powers of administrative bodies.

The attacks upon administrative law and procedure as it has developed in the nation have recently become more vigorous and assertive

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[1]See Appendix, *infra* p. 151 for a complete list of the boards and agencies provided for by statute.

and have resulted in some instances in proposals to limit and control administrative action. With the prevalence of common law ideas of the supremacy of the law, some of these proposals involve a radical departure from the prevailing ideas and practices in the administration of public affairs in a country in which government has a popular basis and sanction.

The vital issue among the numerous controversial questions raised about administrative agencies and administrative law is that of the "rule of law," which in simple terms means that every citizen is entitled to have his rights adjudicated in an established constitutional common law court and to have the right to call into question in such a court the legality of any act done by an administrative official.[2]

Another question which arises and has never been clearly and satisfactorily answered is whether these agencies violate the principles of separation of powers. Many authorities hold, and this is decidedly the weight of authority, that this doctrine does not prevent the merging of legislative, judicial and executive powers in the regulatory commission;[3] but opponents of the administrative agencies contend that these bodies violate this principle and perform mixed functions that are legislative, judicial and executive in a way denied by the American system of government.

Considering the numerous statutory boards and commissions, we find a Mississippian today is born under the aid and assistance of a doctor who has qualified by an examination by the Board of Medical Examiners and a nurse whose preparation and fitness have been determined by the State Board of Nurses.

When he attends the schools of the state, the scope of his education and even the text books which mold his thoughts and conceptions are selected and approved by the State Board of Education. The State Tax Commission determines the cold cash he must pay out for taxes.

After completing his work in the schools, if he wishes to become a lawyer, doctor, dentist, pharmacist, architect, public accountant, optometrist, engineer, barber, or veterinarian, he must satisfy the proper state board of his qualifications before he can begin to earn his living. If he expects to practice podiatry, which consists among other things of removing corns, calluses and properly trimming toe nails, he must satisfy the State Board of Podiatry, as the statute requires, that he is competent and prepared by educational training to perform these important functions.

A man's daily work brings him into close contact with some of the

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[2]DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927) 35.
[3]See Cushman, *Constitutional Status of Independent Regulatory Commissions* (1938-39) 24 CORN. L. Q. 13, 163.

processes of administrative law. The carfare, bus fare and taxicab fare which he pays are determined by the Public Service Commission; if he drives an automobile his license is liable to be revoked for any cause which the Commissioner of Motor Vehicles deems sufficient; he can not even take to the air without a license from the State Aviation Commission; if he wishes to attend a prize fight or wrestling match, the exhibitor must have obtained a license from the Mississippi State Athletic Commission; if crude oil or petroleum is discovered on his lands, in order to sink wells to secure it and even after it is brought from beneath the earth, he finds he must follow well-defined rules and regulations established by the State Oil and Gas Board. If he loses his job and wishes employment, he must go to the State Unemployment Commission, an administrative agency; if he wishes to build a new home in a city he must first secure a permit from the Zoning Commission, which fixes the distance from the street he must build his dwelling, and from his neighbor, and more or less determines the size of the dwelling he wishes to construct; the Egg Advisory Board is charged with the important duty of seeing to it that the market supplies the citizen with fresh eggs alive with all of the necessary vitamins for his health. Finally, when he is weary of life's turmoil with state administrative boards, and lies down in the arms of death, his body is placed for burial in the hands of an embalmer, who has been duly licensed by the State Administrative Board of Embalmers.

Delegating Legislative Powers To State Administrative Agencies

One of the settled maxims in constitutional law is that the powers conferred upon the legislature to make laws can not be delegated by that department to any other body or authortiy. Where the sovereign power of the state has located the authority, there it resides and there it must remain; and by this constitutional agency alone the laws must be made until the Constitution itself is changed.[4]

The power to whose judgment and wisdom the important prerogative of making laws has been entrusted can not relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the wisdom and judgment of any other for those to which alone the people have seen fit to confide this sovereign trust.[5]

It is generally established and determined at this time that the legis-

[4]The Mississippi Constitution provides: "The powers of the government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit: those which are legislative to one, those which are judicial to another, and those which are executive to another." Section 1.

"The legislative power of this state shall be vested in a legislature which shall consist of a Senate and a House of Representatives." Section 33.

[5]Bailey v. Wilson, 128 Miss. 49, 90 So. 362 (1922); Wyeth v. Thomas, 200 Mass. 494, 86 N. E. 925 (1909); *Ex parte* Fritz, 86 Miss. 210, 38 So. 722 (1905); Parkerson, *The New Tariff Act and Delegations of Legislative Power* (1923) 9 A. B. A. J. 177.

lature may enact a law complete in itself, having for its aim the accomplishment of some general public purpose, and may, in order to secure the just and equitable operation of the law thus enacted, delegate the power within definite and valid limitations to make necessary investigations, determine preliminary facts and prescribe reasonable rules and regulations intended to accomplish the operation and enforcement of the law with the express legislative will.

A familiar illustration of the exercise of this power is found when the legislature enacts a law providing that rates for services by railroads and other common carriers shall be reasonable, and creates a board or commission possessed with the power to investigate and fix rates for such services, subject to review by the courts.

The reasoning of the courts as to the validity of such a law is usually based upon the extensive and complex character of the business of rate-making, involving as it does a multitude of details and requiring expert knowledge to conduct intelligently the numerous separate investigations which would render it impossible for the legislature to acquire the necessary information and to fix just and reasonable rates applying to varying conditions and circumstances. If an actual test should be made, it would at once be found impossible and impractical for the legislature, though it has the power to make rates, to do so. Its action would be cumbersome, inadequate and unsatisfactory—in fact, it would prove to be a dismal failure.

In a recent case decided by the Mississippi Supreme Court, the court says,[6] "It is well settled that the legislature has the power to delegate to an administrative agency the right to promulgate such reasonable rules and regulations as might be necessary to accomplish the purpose for which the agency is created."[7]

The court relied, among other cases, on *United States v. Grimaud*,[8] in which Mr. Justice Lamar (a name revered in this state) delivered the opinion of the Court. There was involved in the case the question of the delegation by the legislature of its powers to subordinate agencies. Justice Lamar discussed and elaborated fully the power of Congress to delegate to administrative officers and boards the power to make rules and regulations, and to provide in the same penalties for the violations of such reasonable regulations as the administrative officers might promulgate.

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[6]Unemployment Compensation Comm. v. Barlow, 191 Miss. 156, 169, 2 So. (2d) 544, 546 (1941).

[7]The court cited as authority on the point several important cases: United States v. Grimaud, 220 U. S. 506, 31 S. Ct. 480, 55 L. ed. 563 (1910); Marshall Field & Co. v. Clark, 143 U. S. 649, 12 S. Ct. 495, 36 L. ed. 294 (1892); Abbott v. State, 106 Miss. 340, 63 So. 667 (1913).

[8]220 U. S. 506, 31 S. Ct. 480, 55 L. ed. 563 (1910).

He called attention to the *Marshall Field* case[9] and approved the holdings therein on the point being discussed. The court among other things said that "The legislature can not delegate its power to make a law; but it can make a law to delegate a power to determine some facts or state of things upon which the law makes or intends to make its action depend. To deny this would stop the wheels of government."[10]

In the case of *Ex parte Fritz*[11] the Court held that the power could be delegated to the Board of Supervisors to make rules and regulations for the protection of game and fish and provide penalties for the violation of such rules. In *Abbott v. State,*[12] the Court said that, "'This decision is based on the historical powers conceded to this board, but there is no doubt in that case this court is committed to the liberal rule governing the delegation of legislative functions."

The Mississippi Court has repeatedly committed itself to the doctrine of applying the liberal rule, as opposed to the strict rule in all cases of this nature. Otherwise, it argues, the will of the legislative body would be thwarted and made non-effective.

In Hartman v. May,[13] the court more fully discusses the question of the delegation of legislative powers to administrative agencies than it does in any other case where it has touched upon the question. There is also a full discussion of the power of the legislature to delegate such powers, particularly to municipalities. The facts were that the City of Biloxi passed an ordinance that children should be refused admittance to the public schools of that city, unless they first presented as a condition precedent a proper certificate from the health authorities showing that they had been vaccinated against smallpox. A child's parents had refused outright to comply with the ordinance on the ground that it was invalid and unconstitutional and therefore constituted no reasonable basis for the exclusion of the minor from attending the public schools of the city. An injunction was then asked restraining the municipality and school authorities of the city from barring the child from attendance in the schools. There was no contention in the bill for injunction or on the hearing that the legislature under the Constitution possessed no power to require vaccination of children as a condition precedent to their right to attend public schools, but the contention argued was that in the absence of express statutory requirement of vaccination against smallpox, a municipality was clothed with no power to require vaccination of children as a condition precedent to enrolling in the schools of the city. In other words, it was contended that the general grant of statutory authority to municipalities to

[9]Marshall Field & Co. v. Clark, 143 U. S. 649, 12 S. Ct. 495, 36 L. ed. 294 (1892).
[10]220 U. S. at 520.
[11]86 Miss. 210, 38 So. 722 (1905).
[12]106 Miss. 340, 352, 63 So. 667, 669 (1913).
[13]168 Miss. 477, 151 So. 737 (1934).

make regulations to prevent the spread of contagious or infectious diseases does not give the power to municipalities to exclude children from municipal schools for their failure to be vaccinated.[14]

The court reaffirmed what it had said in a prior case, namely, that the basis of health regulations through administrative agencies is the police power of the state. In the present case, the court said,

> "this police power may be delegated for appropriate purposes to various municipalities and it may be validly exercised by such municipalities for the protection of the health of their inhabitants. . . . [T]he court will not consider whether such ordinances are wise or expedient, merely whether they are a reasonable exercise of the power and authority granted to municipalities."[15]

Two important points should be carefully noted from the holdings of the Mississippi Court where the legislature empowers administrative agencies to exercise powers of any nature; namely, first, it adopts a liberal rule in dealing with the powers granted to the agency and the acts effected or carried out by the agency, and second, the Court indulges the presumption of reasonableness and propriety of the regulation.

In the *McLeod* case[16] a very different and interesting problem of administrative law and the delegation of legislative powers is presented. In the case it is disclosed by the facts that the board of trustees of the public schools of Moss Point passed an unusual ordinance, to the effect that no married person would be admitted or received as a student. One Wanda Dodge Myers, a minor, 16 years old and married, but otherwise eligible as a student, presented herself for enrollment as a student in the high school department for the session 1928-29. She was refused admittance by reason of the ordinance. A writ of mandamus was sought to compel the trustees to admit her. Only a question of law was involved on the hearing.

Section 201 of the Mississippi Constitution provides for the establishment of a uniform system of free schools for all children between the ages of 5 and 21 years. Paragraph 1 of Section 126, Chapter 283 of the Laws of 1924, empowers school trustees, "to prescribe and enforce rules and regulations not inconsistent with law." School trustees constitute an administrative board to whom legislative powers have been delegated. Under and by virtue of these delegated powers, the trustees control and operate the public schools of the State.

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[14]The provisions of the law governing the authority of municipalities of this state empowered them "to make regulations to secure the general health of the municipality," and, "to make regulations to prevent the introduction and spread of contagious diseases." MISS. CODE ANN. (1942) §§ 7037 *et seq.*

[15]168 Miss. at 484, 151 So. at 738. See also McLeod v. State, 154 Miss. 468, 122 So. 737 (1929).

[16]McLeod v. State, 154 Miss. 468, 122 So. 737 (1929).

> In its determination of the question of law raised, the Court said, "The court will not interfere with the exercise of discretion, unless there is a clear abuse of the discretion, or violation of law. The court will not consider whether such rules and regulations are wise or expedient, but merely whether they are a reasonable exercise of the authority conferred upon trustees by law. . . . The presumption is always in favor of reasonableness and propriety of any such rule. Their reasonableness, however, is always a question of law for the courts."[17]

The court declared the act of the trustees unreasonable and unjust.

Powers and Nature of Administrative Boards

There is no inherent power in administrative boards. They are simply creatures set up by the state legislature and by legislative acts clothed with sovereign power for the sole purpose of carrying out the will of the legislature.

Administrative boards are limited in their powers, by the Constitution and legislature. They are not, strictly speaking, a judicial body. Their jurisdiction, now and always, has been mixed; being in part legislative, in part judicial, and in part executive. It is often said the power is quasi-legislative or quasi-judicial in order to point out that the power exercised is not purely legislative or judicial.

These boards, while operating as independent important agencies in the carrying out of stated purposes and policies, do so on a plane which, in theory at least, is subordinate in importance to that occupied by the legislative, judicial, and executive branches of the government. It is certainly true that their policies and indeed their very existence are dependent upon the will of the legislature that created them, and infused life and sovereign power into them. By reason of these facts the acts and orders of these boards when they are valid and constitutional have the force of laws.

Historically, the mingling of these functions or powers in administrative boards goes far back into the history of English and American jurisprudence.[18] In the colonies, under the charters and other forms of government, down to the formation of the United States and particularly throughout the history of our present form of government, the local blending of judicial, legislative and executive functions has at times been an approved fact.[19]

There have been created by the legislature several types of regulatory administrative agencies. These, generally speaking, may be comprehended

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[17] 154 Miss. at 474, 122 So. at 738.
[18] Port, Administrative Law (1929) 54.
[19] Dickinson, Administrative Justice and the Supremacy of Law (1927) 33.

and treated as to their powers under the heads, commissions or boards regulating public utilities, and examining or licensing boards, which pertain to boards concerned with the health, safety and general welfare.

Commissions and Boards Regulating Public Utilities

The Mississippi Supreme Court has uniformly held that the Railroad Commission, now the Public Service Commission, is merely an administrative agency, without power to create a final judgment.[20] It has further declared that its findings are only prima facie conclusive and will be so considered by the reviewing court. Says the Court, "But at last the reasonableness and consequently the lawfulness of its determination is left subject to judicial inquiry and decision."[21]

The Court cited and approved in this case a Connecticut decision[22] dealing with the point under discussion. The Connecticut Court, speaking of its railroad commissioners and their powers, says,

> "We think that the Commissioners were not Judges, that their duties are not judicial, and their decisions are not judgments. The Constitution declares that the judicial power of the state shall vest in the Supreme Court of Errors . . . their duties, except in a very limited sense are not judicial. They do in many cases hear evidence, weigh it and decide and their decisions are in writing and perhaps recorded. Their duties are not to enforce rights and redress wrongs, as a Court of Justice, but stand in the place of the Legislature between corporations and the public and supervise the exercise of corporate powers so that no injustice may be done."[23]

The legislature, of course, has the power and right to discharge these duties itself but when railroads became numerous with both frequent and complex complaints, the power was wisely delegated to a board that could act promptly and with a decided advantage to all concerned. "The duties of this board, therefore, are not judicial but such as pertain to the administrative powers of the Legislature itself."[24]

Chief Justice Smith in an important Mississippi case makes the statement, "The Railroad Commission is a mere administrative agency, having nowhere been given the power to apply the law to a state of facts and make a final declaration of the consequences which follow."[25]

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[20]Western Union Tel. Co. v. Mississippi R. R. Comm., 74 Miss. 80, 21 So. 15 (1896).
[21]74 Miss. at 92, 21 So. at 17.
[22]Connecticut v. New Haven Co., 43 Conn. 351 (1876).
[23]*Id.* at 381.
[24]*Id.* at 382.
[25]Illinois Cent. R. R. v. Dodd, 105 Miss. 23, 44, 61 So. 743, 744 (1913).

Justice Brewer of the Supreme Court of the United States in passing on the question under discussion briefly declares,

> "There can be no doubt of the general power of the state to regulate fares and freights which may be charged and received by railroads or other carriers and the regulation may be carried on by means of a commission. Such a commission is merely an administrative board created by the state for carrying into effect the will of the state as expressed by its legislature. . . . [I]f the rates established by the commission while not conclusive, they are at least prima facie evidence of what is reasonable and just. . . . The courts are not authorized to revise or change the body of rates imposed by a legislature or commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation."[26]

The state and federal courts have unanimously held that the statutes creating the Railroad Commission and giving it power to supervise common carriers and public utilities are constitutional.[27] The Supreme Court has referred to those bodies as being of limited statutory jurisdiction and has ruled from time to time until it has become axiomatic that the railroad commissions and public service commissions possess and can exercise no powers not granted by statute. The court has emphasized the fact that they possess only the powers *expressly* given them by statute.

Examining and Licensing Boards

There are 18 licensing boards set up by statutory law. The boards have all necessary power by statute to make rules, regulations and ordinances for their operation. The only difference between these boards and a board such as the Public Service Commission or that created by the Motor Vehicle Act is that the boards are empowered to issue under proper legal conditions certificates or licenses, as when an attorney, physician or pharmacist is issued a license to practice his profession. The courts of Mississippi have construed the acts of but few of these licensing boards. The most prominent and important of these boards is the Board of Health

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[26]Reagan v. Farmers Loan and Trust Co., 154 U. S. 362, 393, 394, 395, 397, 14 S. Ct. 1047, 38 L. ed. 1014 (1894).

[27]Alabama & V. R. R. v. Railroad Comm., 86 Miss. 667, 38 So. 356 (1905), *aff'd* 203 U. S. 496, 27 S. Ct. 163, 51 L. ed. 289 (1906); Stone v. Natchez, J. & C. R. R., 62 Miss. 646 (1885).

and Quarantine. The statute[28] empowers this board to make and publish all reasonable rules and regulations necessary to enable it to discharge its powers and to carry out the purposes and objects of its creation and all reasonable sanitary rules and regulations to be enforced in the several counties by the county health officer under the supervision and control of the State Board of Health. The orders of the Board of Health must stand the test of reasonableness or unreasonableness. This is a judicial question.[29]

The constitutionality of this board was tested and upheld in a well-considered case.[30] The case grew out of an ordinance or regulation passed by the board requiring milk cows used in the dairy business to be examined by inspectors appointed by the board. The Court stated that the law was constitutional under the police power of the state, as its purpose under the legislative act was to promote, protect, and preserve the safety and health of the people of the state, and also to prevent the spread of disease. The Court held the regulation did not violate Sections 14 and 17 of the Constitution of Mississippi, nor Section 1 of the 14th Amendment to the federal Constitution.[31] The court says, "There is no purpose therein to deprive a person of property or restrict or interfere with his liberty of action. It is only an inspection provision ordained by the board in its work of supervising and promoting the health interest of the people. . . . We deem it in harmony with the organic law of the state and nation."[32]

In an Indiana case[33] cited often by the courts of the nation and approved by the Mississippi Supreme Court, the Indiana Supreme Court states,

> "In order to secure and promote the public health, the state creates boards of health as an instrumentality or agency for that purpose and invests them with the power to adopt ordinances, by-laws, rules and regulations necessary to secure the objects of their organization. While it is true that the character or the nature of such boards is administrative only, still the powers conferred on them, in view of the great public interest confided to them, have always received from the courts a liberal construction; and the right of the legislature to confer upon them the power to make reasonable rules, by-laws, and regulations is generally recognized by the authorities."[34]

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[28]MISS. CODE ANN. (1942) § 7031.
[29]*Id.* §§ 7016-7131.
[30]Hawkins v. Hoye, 108 Miss. 282, 66 So. 741 (1914).
[31]Section 14 of the Constitution reads, "No person shall be deprived of life, liberty or property without due process of law." Section 17 reads, "Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof."
[32]108 Miss. at 290, 66 So. at 744.
[33]Blue v. Beach, 155 Ind. 121, 56 N. E. 89 (1900).
[34]56 N. E. at 92.

These ordinances, rules and regulations by law within the respective jurisdictions have the force and effect of a law of the legislature, and like an ordinance of a municipal corporation, they may be said to be in force by authority of the state.

The State Board of Barbers issues licenses to those who meet the standards required by the board and who on examination show a practical and efficient knowledge of the work to be done by a barber. The law provides that the Board of Barber Examiners shall have authority to make reasonable rules and regulations for the administration of the Act.[35]

In *Clark v. State*,[36] an interesting case which was commenced in the court of the justice of the peace, prosecution by affidavit was instituted against the appellant, charging him with unlawfully practicing the profession of barbering without a valid license. He was convicted and appealed to the circuit court where he was tried on an agreed state of facts. The case finally reached the Supreme Court of the state. The Supreme Court in rendering its opinion cited *Marshall Field & Co. v. Clark*,[37] in which it was said, "The legislature can not delegate its power to make a law, but it can make a law to determine some fact or state of things upon which the state makes or intends to make its own action depend."[38]

The Court in an often cited case[39] expressly held the legislature had power to lay down the general rule by which a sanitary board created by it could make rules and regulations to prevent the spread of contagious and infectious diseases of livestock and at the same time provide penalties for the violation of such rules and regulations adopted by the board.

"As to the power of the Legislature," said the Court in *Clark v. State*,[40] "to create a board to find facts and to carry out the general purpose of the Legislature by reasonable rules and regulations, the authorities are abundant."

Recognition of Municipal Administrative Agencies

One difficulty encountered in connection with the legality of administrative agencies created by municipalities and counties has been caused by the fact that questions of administrative law were not clearly separated from questions of police power. Before the court determines whether or not an administrative board is properly set up, it must first determine whether or not the legislative body has the right to act at all as to the particular subject matter.[41]

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[35]Miss. Code Ann. (1942) § 8728.
[36]169 Miss. 369, 152 So. 820 (1934).
[37]143 U. S. 649, 12 S. Ct. 495, 36 L. ed. 294 (1892).
[38]143 U. S. at 694.
[39]Abbott v. State, 106 Miss. 340, 63 So. 667 (1913).
[40]169 Miss. at 381, 152 So. at 822.
[41]Schechter Poultry Corp. v. United States, 295 U. S. 495, 55 S. Ct. 837, 79 L. ed. 1570 (1935).

In an early, well-reasoned Mississippi case,[42] the question of delegation of power by the legislative body is carefully and ably discussed in the briefs filed by counsel and by the court in its reasoning and decision. The conclusion was reached that although the legislative power is vested solely and exclusively in the legislative department of the state government, yet for the purpose of carrying out its intent and will the legislature may clothe municipalities with discretion and power to do certain things the people wish to be accomplished. This discretion and power which is delegated to the municipality is not the delegation of pure legislative powers for the very sound reason that neither the state nor any one of its departments can delegate its sovereign powers or any part thereof.

The Constitution of the state makes no provision for such delegation. The Court says that members of the legislature "have the undoubted right to delegate as much or as little of this inherent political power as they see proper; and to vest it in such agents or departments of government as they choose to designate."[43] From the learned briefs in the case and the vigorous development of the law by the Court, it is clear and certain the legislature may clothe municipal bodies with the discretion of prescribing rules and regulations having all the force of law. Although the action of the body holding the delegated power is legislative in form, in substance it is executive, and the body is but an administrative board, and its function is to consummate the supreme legislative will; but in doing this the legislative department does not divest itself of any of its original powers. It still has all the power it ever had. It is still the repository of the legislative power of the state.

The statute provides that a municipality may pass sanitary laws, establish a board of health, and enforce the collection and registration of birth, health and mortuary statistics.[44] This is a statutory enactment of the legislature which confers on the municipality legislative authority, but it must be understood the powers here conferred by the legislature are for the sole purpose of carrying into effect the sovereign power and will of the state through these several administrative agencies.

It is said by the Court that it is by virtue of the police power that these foregoing powers may be exercised by a municipality. This may all be true but, at the same time, the operation of the powers of the municipality is in its nature administrative. The presence of the police power as a basis for action does not take away the nature of the acts done.

It is clear from all the authorities that while it may be said that municipalities operate under the police power, yet they can exercise no power, including police power, which is not expressly granted them by

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[42]Alcorn v. Hamer, 38 Miss. 652 (1860).
[43]*Id.* at 748.
[44]Miss. Code Ann. (1942) § 7047.

the statute law. They can not legally and constitutionally proceed on the theory that by reason of the presence of the police power they can operate regardless of statute on an assumed inherent power with which they are endowed.[45]

Judicial Review and Procedural Methods

The question of the relationship between the courts and the administrative agencies revolves chiefly around two problems: (1) the degree of finality to be accorded the administrative agency's finding of fact; (2) the developing of procedural methods which give assurance that all matters will receive fair consideration and that the administrative process will not be arbitrary. According to some students of administrative law, the second is supplanting the first as the more important area of developing principles today.

The contention is that more and more the question of fact-finding is being left to the administrative agencies, subject only to the requirement that the process by which those facts are ascertained be a fair, impartial and unbiased one according to judicial standards. It has been said that the doctrine of judicial review of administrative decisions represents our American compromise between the necessity of getting things done and a distrust of government.

Judicial review, like administrative procedure, has behind it a long history of development. In the general consideration of the administrative process, it has definite relation to the development of administrative procedures prior to resort to the courts by affected parties. The propriety and necessity of some form of judicial review is not challenged in this state and its development has been shaped by statutes and in some instances by the courts themselves. It has been said that courts and administrative agencies are related instrumentalities of justice and the reviewing courts sit as courts of equity.[46] But when there is no statutory administrative hearing in adjudications and consequently no right to have relevant facts determined in the reviewing courts, the following consequence necessarily ensue: there may be no administrative remedy to exhaust; there is no method for the presentation of issues of errors; there is no administrative record to which review is confined; there are no administrative findings or conclusions to be reviewed upon the administrative record.

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[45]See Barbier v. Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. ed. 923 (1884); Town of Clinton v. Turner, 95 Miss. 594, 52 So. 261 (1909); Fitzhugh v. City of Jackson, 132 Miss. 594, 52 So. 261 (1923).

[46]Scripps-Howard Radio v. Federal Communications Commission, 316 U. S. 4, 62 S. Ct. 875, 86 L. ed. 1229 (1942); United States v. Morgan, 307 U. S. 183, 59 S. Ct. 795, 83 L. ed. 1211 (1939).

The Mississippi Court has definitely established a liberal attitude in the much mooted matter of the scope of judicial review. The position of the court is clear; it will not substitute its own judgment on the facts for the findings of the administrative agency, unless injustice, arbitrariness and fraud are apparent in the finding. If a legal question is involved in the finding of the agency, it creates a sufficient necessity for a review of the finding of the court.

Aside from court *dicta* to the contrary and usual statutory provisions, the following appears to be the general rule: when administrative or commission findings and order do not involve constitutional rights, they are conclusive on the reviewing court if a fair hearing was afforded with due process observed and if supported by any substantial evidence. However, if the administrative or commission findings and order raised issues of constitutional rights or important legal problems, then upon a review it is the duty of the court to exercise its independent judgment and if the weight of evidence clearly establishes an invasion of a legal right, it must veto the order.[47]

Where the determination of the administrative tribunal is to all intents and purposes legislative in character or where it does not directly affect vested rights of liberty or property, the court will not review the exercise of discretion, unless it is clearly shown that the power of the tribunal was used capriciously, without substantial evidence, or fraudulently. The court will intervene in a review of the case if there is no evidence to support the order or judgment of the agency, and will require the agency, if necessary by mandamus, to exercise its discretion, if action is required by statute. But the court will not interfere with or control the method of the exercise of discretion or the performance of any duty requiring the exercise of judgment, nor will it modify the finding, or correct errors of discretion which have been honestly made in the discharge of its duties, if within the limit where no injustice has been done and due process has been observed.

The courts in their decisions emphasize the peculiar fitness of administrative officials familiar with the subject matter and informed by experience and training to pass upon questions of fact presented to them and recognize that, in the absence of any unusual circumstances, they should not substitute their own judgments for such findings. Our court, even in rate-making cases which embody mixed questions of law and fact, has adhered to the rule that it will not disturb the order or judgment of the commission, except upon a clear showing by satisfactory evidence that it is unreasonable and unlawful.

The Mississippi courts have hesitated, as definitely and fully disclosed

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[47] Poley, *Conclusiveness of Administration and Commission Findings* (1942) 21 NEB. L. REV. 339.

by the decisions, in modifying, reviewing or setting aside the regulations, order or judgment of an administrative agency, especially if the proper procedure has been followed, and especially do they hesitate if the party seeking relief has been accorded due process of law. Due process of law is as necessary in administrative proceedings as in courts of law and equity.

The statutes specially set out the procedure for the hearing of cases arising from a holding by the Railroad Commission, now the Public Service Commission,[48] and the Oil and Gas Board. An appeal for review by the aggrieved party may be had from the former, but as to the latter a trial *de novo* is granted the aggrieved party.[49]

Trial *de novo* is provided by statute on appeal from the regulations, orders or judgments of the State Oil and Gas Commission, assessment of taxes by the Board of Supervisors or municipalities where the tax assessor's report is contested,[50] and in matters appealed from orders of the State Board of Public Accountancy.[51]

Certiorari is expressly permitted by statute[52] in one instance in order to bring before the circuit court for review the order of a commission. The Supreme Court has held in more cases than one that *certiorari* may be resorted to for the purpose of review of orders and judgments of administrative boards and commissions.

In *Gulf & S. I. R. Co. v. Adams*[53] it was held that the Railroad Commission was an inferior tribunal to the circuit court, within the meaning of Sections 90 and 91 of the code of that date, for which reason the Court said *certiorari* would lie to review an order made by an administrative tribunal.

In a later case,[54] which cited and approved the holding in the *Adams* case, it was further held that the circuit court was probably given jurisdiction to review by *certiorari* the quasi-judicial acts of a tribunal exercising quasi-judicial powers.

From the reasoning of the court in a late and important case,[55] it would appear that *certiorari* would lie to review not only the holding of a quasi-judicial order of an administrative agency, but also a legislative order where the same was arbitrary, capricious and not supported by substantial evidence would be reviewed. The circuit court will have jurisdiction to review such a finding by the administrative agency.

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[48]Miss. Code Ann. (1942) §§ 7809 - 15.
[49]*Id.*, § 6136.
[50]*Id.*, §§ 1196, 9803. See also Jackson v. McCardle, 189 Miss. 781, 198 So. 736 (1940); Knox v. Dantzler Lumber Co., 148 Miss. 834, 114 So. 873 (1927).
[51]Miss. Code Ann. (1942) § 8910.
[52]*Id.*, § 8893 (3).
[53]85 Miss. 772, 38 So. 348 (1904).
[54]Illinois Cent. R. R. v. Dodd, 105 Miss. 23, 61 So. 743 (1913).
[55]Dixie Greyhound Lines, Inc. v. Mississippi Pub. Ser. Comm., 190 Miss. 704, 200 So. 579, 1 So. (2d) 489 (1941).

Injunctions are resorted to with some degree of frequency if a determination is made by an agency and there is no provision by statute for an appeal to the circuit or chancery courts in order that there might be a judicial review of its finding. No form of procedure in the hearing is provided in the case of 39 boards or commissions created by statute, nor is there any right of appeal given by these statutes.[56] The party who brings a matter before any one of these 39 administrative agencies is left entirely in the dark as to any form of procedure before the agency which he may follow, and if aggrieved by the order or judgment of the agency he is deprived of the right to appeal. His only recourse in such cases is to enjoin the proceeding filed, or the enforcement of the order or judgment of the agency.

Mandamus has been successfully invoked in cases involving the refusal on the part of licensing boards to issue a license, or where the board suspended or revoked the license. The use of this procedure is well illustrated in the case of *Watkins v. Mississippi State Board of Pharmacy.*[57]

In a later case[58] a teacher had contracted with a board of school trustees to teach. The court held the contract was a *valuable right* and was enforceable by mandamus when the board refused to observe it and carry it out according to its provisions.

The following procedural requirements appear to be necessary in any case before an administrative agency, in order to bring the trial and determination within the purview of due process: (1) Notice to all parties interested in the issues involved; (2) process for witnesses and subpoena *duces tecum;* (3) a hearing in which all interested parties may have opportunity to appear and be heard; (4) the admission of all evidence relevant to the issues involved; (5) the hearing and action of the tribunal at a regular meeting, as provided by law; (6) when the procedure is fixed by statute, all findings to be in writing and appear on record, and as a rule the evidence to be reduced to writing and become a part of the record; (7) any party aggrieved by the finding of the administrative agency to have a right by some form of procedure to have the finding reviewed, or heard anew by a superior court.

In cases wherein the order or judgment of the agency appealed from is a judicial finding, instead of legislative or executive, the court must review, affirm, reverse or modify the same and enter therein such order or judgment as may be right and just.

All such appeals shall be taken and heard, determined and perfected on the record, including a transcript of pleadings and testimony, both oral and documentary[59] of the agency, where the statute provides for the mak-

[56]See Appendix. *infra* p. 151.
[57]170 Miss. 26, 154 So. 277 (1934).
[58]Stokes v. Newell, 172 Miss. 289, 159 So. 540 (1935).
[59]Miss. Laws 1938, c. 139, § 10.

ing of a complete record before the board, as in a hearing before the Public Service Commission.

In a recent case[60] handed down in 1941, a ruling of considerable importance was made by the Supreme Court in which the Court goes fully into the matter of the review of administrative findings.

It might be noticed that in a prior decision,[61] it had been held that the circuit court had decided properly in a refusal to review a finding of the Railroad Commission, on the ground that the order or judgment of the commission was in its nature legislative and not judicial and therefore not a subject for judicial cognizance, emphasizing the fact that the circuit court could review only orders of the commission which were quasi-judicial, and not wholly legislative.

In the more recent case the correctness of the circuit court action in refusing *certiorari* in the earlier case is reaffirmed, but attention is called to the fact that the legislature possesses the power and authority to provide a direct appeal to the circuit court and that such direct appeal had been authorized for the Public Service Commission under and by virtue of the Mississippi Laws of 1938, above mentioned.

In the argument supporting the opinion rendered in the second *Dixie Greyhound* case,[62] the Court makes reference to Section 156 of the Mississippi Constitution, which provides, "The Circuit Court shall have original jurisdiction in all matters civil and criminal in this state not vested by this constitution in some other court, and such appellate jurisdiction as shall be prescribed by law." The Court also calls attention to several leading cases decided by the Supreme Court of the United States dealing with the question under discussion. Particular reference is made to *Interstate Commerce Commission v. Illinois R. R. Co.*,[63] and *Interstate Commerce Commission v. Union Pacific Ry. Co.*[64] The decisions in these cases bear out the theory that the court must examine administrative findings for the purpose of deciding the question whether the agency was acting within the scope of the legislative authority delegated to it, or to ascertain whether its order is supported by substantial evidence and is not an arbitrary and capricious exercise of power.

The Court in the second *Dixie Greyhound* case had this to say:

> "It is unnecessary to determine whether the Public Service Commission was acting in a judicial capacity or quasi-judicial instead

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[60]Dixie Greyhound Lines, Inc. v. Mississippi Pub. Ser. Comm., 190 Miss. 704, 200 So. 579, 1 So. (2d) 489 (1941).

[61]Dixie Greyhound Lines, Inc. v. Mississippi Railroad Comm., 174 Miss. 1, 163 So. 443 (1935).

[62]190 Miss. 704, 200 So. 579, 1 So. (2d) 489 (1941).

[63]215 U. S. 452, 30 S. Ct. 155, 54 L. ed. 280 (1910).

[64]222 U. S. 541, 32 S. Ct. 108, 56 L. ed. 308 (1912).

> of a purely administrative or legislative capacity when it decided the contest . . . for the reason that in either event the court below had jurisdiction to review the order or judgment of the Public Service Commission. . . . That a court of competent jurisdiction has the power to review any order made by an administrative commission to determine if it is supported by substantial evidence, within the meaning of that term, as hereinbefore defined or is purely arbitrary or capricious, beyond the power of the commission to make, or violates some statutory or constitutional right of an interested party is so well settled as not to be open to any doubt. . . . In reviewing such order 'power to make the order, and not the mere expediency or wisdom of having made it is the question.' "[65]

In determining that question the Court, as fully disclosed by decisions both Federal and state, considers,

> "(a) All relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority which it purports to have been made; and (c) . . . whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner, as to cause it, in truth, to be within the elementary rule that the substance and not the shadow determines the validity of the exercise of power."[66]

The Mississippi Court in a somewhat early case said that,

> "The findings and determinations of matters committed to the railroad commission by it are not final and conclusive, and it was never so intended by the statute. It is a mere administrative agency, although in some respects it exercises quasi-judicial power. But at last the reasonableness and lawfulness of its determination is left to judicial inquiry and decision."[67]

This being true with reference to Section 10, Chapter 139, and Section 28, Chapter 142 of the Laws of 1938, the Court holds that the sections, "simply provide a new method of procedure by which orders of this

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[65]190 Miss. at 713-14, 200 So. at 579-80. Also note the following cases: Illinois Cent. R. R. v. Dodd, 105 Miss. 23, 61 So. 743 (1913); Western Union Tel. Co. v. Mississippi Railroad Comm., 74 Miss. 80, 21 So. 15 (1869); Miss. Railroad Comm. v. Mobile & O. R. R., 115 Miss. 101, 75 So. 778 (1917); Mobile & O. R. R. v. Miss. Pub. Serv. Comm., 188 Miss. 698, 195 So. 395 (1940).

[66]190 Miss. at 714, 200 So. at 580, quoting Interstate Commerce Comm. v. Illinois Cent. R. R., 215 U. S. 452, 470, 30 S. Ct. 155, 54 L. ed. 200 (1910).

[67]190 Miss. at 715-16, 200 So. at 581, quoting Western Union Tel. Co. v. Mississippi Railroad Comm., 74 Miss. 80, 92, 20 So. 15, 17 (1896).

administrative board may be reviewed by a court. It confers no judicial power on the courts but simply creates a new procedure by which existing judicial power may be exercised."[68]

In the case of *Mississippi Railroad Commission v. Mobile & Ohio R. R. Co.*,[69] the Commission after a hearing ordered the railroad company to erect a new depot. An injunction was filed by the railroad company resisting the order of the commission. The case was heard by the chancery judge. Among other questions raised on the hearing, one was to the effect that an injunction was not a proper proceeding. This contention was dismissed by the Court. The Court held the Commission was not acting in a judicial capacity when it ordered the depot to be built, but was acting in a legislative capacity in so doing, and therefore its procedure was proper.

The Supreme Court said that "the order of the Commission was prima facie evidence that it was right and proper and the lower court should have sustained this finding, unless the testimony showed, 'by clear and satisfactory evidence that the order of the Commission complained of is unlawful and unreasonable.' "[70]

The rule for procedural methods and judicial review laid down in the second *Dixie Greyhound* case and by the statutes passed by the legislature in 1938 applied, seemingly, to that case; but it raises the question if this same rule applies to all cases of review where an appeal is allowed by statute from the determination of an administrative agency. It is believed this same rule will be applied in all such cases. We have no Mississippi case on this point as an authority.

A law review article discussing appeals under the Mississippi Unemployment Law sets out the holding of the *Dixie Greyhound* case and adds: "This reasoning appears applicable to unemployment compensation appeals. . . . Findings of fact 'supported by evidence' are conclusive, and remedy by judicial review can only be sought when erroneous interpretations are posited."[71]

An appeal from the circuit court judgment to the Supreme Court may be taken in all of these cases.[72]

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[68]190 Miss. at 716, 200 So. at 581.

[69]115 Miss. 101, 75 So. 778 (1917).

[70]115 Miss. at 113-14, 75 So. at 780. See also Illinois Cent. R. R. v. Dodd, 105 Miss. 23, 61 So. 743 (1913); Yazoo & M. V. R. R. v. Wallace, 90 Miss. 609, 43 So. 469 (1907); Planters' Ins. Co. v. Cramer, 47 Miss. 200 (1872).

[71]Todd, *Appeals and Judicial Review Under the Mississippi Unemployment Compensation Law* (1941) 13 Miss. L. J. 501, 507-08.

[72]Mississippi Unemployment Comm. v. Barlow, 191 Miss. 156, 1 So. (2d) 241, 2 So. (2d) 544 (1941); Miss. Laws 1940, c. 295, § 4, which is an amendment of the original statute. See Miss. Laws 1936, c. 176, § 6.

Evidence

It is customary in statutes creating administrative agencies to make no provision that they shall be bound by the ordinary common law rules of evidence; in fact, the nature and complexion of the tribunal which hears the evidence make this impossible. It is presumed that all evidence introduced has a probative relation to the issues involved before the agency.

The very purpose of a hearing is to afford parties an opportunity to present competent and relevant evidence, and the refusal of an agency or its presiding officer to permit its introduction is an abuse of discretion.

It is generally recognized that common law or jury trial rules of evidence have no place in administrative procedure. On the other hand, the basic and general principles of evidence and proof are recognized in administrative proceedings. The customary statutory provisions for judicial review require that administrative orders be supported by "substantial evidence," so that reliable and probative materials of record are thereby required. The agency not being a court presided over by one learned in the law and the rules of evidence, most naturally it might be expected that evidence prohibited by common law rules would creep into the case.

There are underlying reasons why a strict adherence to the common law rules of evidence is not enforced. One is that it is impracticable in such proceedings; another is that the individual affected by the workings of the administrative agency cannot afford counsel, so that invocation of trial technique, objections to evidence, and the technicalities of legal proof would only penalize the poor.

The failure to adhere to strict rules of evidence in administrative proceedings is not the rejection of the principles of evidence built up by our Anglo-American system of law through many centuries, so far as court proceedings are concerned. Many of the rules of evidence are the results of our jury system, whereas administrative tribunals must work under different circumstances. The process, like many of the processes in connection with administrative law, is still in the formative stage. Its evolution is an adoption of general principles to changed conditions and new tribunals.

In view of the informal nature of administrative proceedings and the fact that the members constituting the board or commission are not required to be trained in the law, the freedom of action thus allowed, in the admission of evidence is not only wise, but in the interest of speedy and substantial justice. But, if the commission or board has predicated its determination upon matters of no probative force, or of doubtful probative force, the Court upon a review of the findings has the power to modify the order or judgment of the administrative agency, especially if the finding by reason of such evidence is arbitrary and unjust.

If it be a judicial question passed upon by the board, there is less hesitancy on the part of the reviewing court in modifying, or indeed wholly rejecting the agency's finding, if based on improper evidence, than if the board's finding was of a legislative nature. The Court's attitude on reviewing the record of the trial before the administrative board is one of liberality in relation to the evidence produced before the board and its findings, but liberality consonant with justice and due recognition of the fundamental rights of the parties.

The Mississippi Courts in their decisions have not gone into any detailed discussion concerning any rules governing the admission of evidence before administrative tribunals. For the reason above stated, it is impossible with laymen hearing and determining the matters coming before tribunals to apply statutory or common law rules of evidence. If there is an appeal to the circuit or chancery court, a review of the proceedings before the administrative agency follows. The appellate court, if justice has been done by the administrative agency, will not reverse its findings, because of the fact alone that some evidence was admitted contrary to the well-known rules governing the introduction of evidence.

The Supreme Court of the United States has referred to the problem in two cases,[73] the first being an opinion delivered by Chief Justice Hughes in which he says, speaking of the administrative tribunal:

> "There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of facts. Nothing can be treated as evidence which is not introduced as such. . . . Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusions. Findings based on the evidence must embrace the basic facts which are needed to sustain the orders."[74]

In the other case, in which Justice Brandeis delivered the opinion, the statement was made that "The mere admission by an administrative tribunal of matter which under the rules of evidence applicable to judicial proceedings would be deemed incompetent does not invalidate its order. . . . But a finding without evidence is beyond the power of the commission. . . . Nothing can be treated as evidence which is not introduced as such."[75]

The Mississippi Court, while making no definite announcement as to rules of evidence in any case coming before it, where it was originally heard

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[73]Morgan v. United States, 298 U. S. 468, 56 S. Ct. 906, 80 L. ed. 1288 (1936); United States v. Abilene & So. Ry., 265 U. S. 274, 44 S. Ct. 565, 68 L. ed. 1016 (1924).

[74]Morgan v. United States, 298 U. S. 468, 480, 56 S. Ct. 906, 80 L. ed. 1288 (1936).

[75]United States v. Abilene & So. Ry., 265 U. S. 274, 288, 56 S. Ct. 906, 80 L. ed. 1288 (1936).

by an administrative tribunal, would apparently follow the rules above laid down by the Supreme Court of the United States. The court upon a consideration of the cases of this nature coming before it inferentially has taken the position that the administrative tribunal is not bound by any fixed common law rule of evidence, yet it can make no order or judgment of fact in the absence of some competent evidence used as a basis for its finding.

Conclusion

In fine it appears to be proper and important in concluding the discussion in this paper of administrative law to call the reader's attention to the attitude and thought of the great legal minds of the United States concerning this subject. Every legal periodical today carries views and expressions concerning bureaus, commissions and administrative laws. Many profound lawyers, law teachers and scholars view with alarm the tremendous growth of commissions, bureaus and administrative boards. The American Bar Association has prepared bills which will be introduced in Congress to combat this rapidly growing evil in our judicial system.

There is one special field of law development which has manifestly become inevitable. The Interstate Commerce Commission, the Public Service Commission, the Federal Trade Commission, the powers of the Federal Reserve Board, the health departments of the states and other supervisory offices and agencies are familiar illustrations. Before the force and urgency of these agencies, the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight.

The courts of Mississippi have expressed no opinion of their views of the lurking dangers of administrative or bureaucratic form of state government. In fact, it would have been improper for them to do so. The evils that may grow out of laws passed by the legislature are not for them to correct. The people, the electorate of the state, are charged with duty of correcting, through the legislature, bad laws.

The courts are charged with interpreting the laws, and if they are constitutional, enforcing them. It is not their province to criticize or declare that laws are bad or evil in their effect.

No doubt as to these agencies, we will go on and expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrongdoing which under our new social and industrial conditions can not be practically accomplished by the simple procedure of legislatures and courts as in the past generations.

Yet the vast powers that are committed to these regulating agencies, and which are necessary if they do their work in an effective way, carry with them great and dangerous opportunities of oppression and wrong.

If we are to continue a government of limited powers, these agencies of regulation must of necessity be regulated. The limits of their power over the citizen and his property must be firmly fixed and determined. The rights of the citizen against them must be made certain and plain.

A system of administrative law must be developed, both state and national. Such a system has hardly yet been born.

J. O. Boyd, a prominent member of the Iowa Bar Association, made this statement in 1938: "Government by bureaucracies has all of the weaknesses of an autocracy and few of its advantages. Continued growth of bureaucracy will mean the doom of democracy, the destruction of all progress, the complete bankruptcy of free government and will eventually lead to fascism or some form of totalitarianism.[76]

The writer thinks this an extreme statement of the situation but it points out to us the seriousness with which many able lawyers look upon the present conditions existing by reason of the great and immense powers and influence wielded by administrative agencies and commissions.

In an address delivered in May, 1940, before the New Jersey State Bar Association, Samuel Kaufman asks the question, "Is the Administrative Process a Fifth Column?"[77] He further says these agencies "lack uniformity, procedural organization and certainty. They have no rhyme, no scheme, no limit. Small wonder the public has begun to view them as a lurking omnipresence, to fear them as a power which may usurp without warning and whose edict may not be reviewed. . . . Nor should the phrase 'administrative law' lull us into false security—there is plenty of administration but very little of law. In fact, too often, does it border on administrative lawlessness."

In 1939 the then president of the American Bar Association, Mr. Jacob Lashly of the St. Louis Bar, called upon lawyers to combat vigorously at no matter what costs in popularity, the " 'progressives,' 'liberals' or 'radicals' who desire to invest the National Government with totalitarian powers in the teeth of constitutional democracy," by expanding the scope of administrative activity.[78]

Mr. David A. Simmons, a distinguished Texas lawyer, who is the present president of the American Bar Association, in a statement before the House Committee on Administrative Procedure Bills in 1943, made this significant remark: "In 1937 the President of the United States recommended a reorganization of the federal executive branch upon the ground

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[76]Boyd, *The Court System Contrasted with the Bureau System* (1938) 5 IOWA BAR REV. 25, 28-29.

[77]Kaufman, *Is the Administrative Process a Fifth Column?* (1940) 6 JOHN MARSH. L. Q. 1.

[78]Lashly, *Administrative Law and the Bar* (1939) 25 VA. L. REV. 641, 658.

that the present form of administrative tribunal, which performs 'administrative work in addition to judicial work, threatens to develop a "fourth branch" of the government for which there is no sanction in the Constitution.' "[79]

This statement coming from the President of the United States should make all those who love and adhere to the theory of our democratic form of government which prevailed in the long ago give serious consideration to the rapid expansion of administrative agencies, bureaucratic forms of government and the legions of commission organizations which have taken over the rule of governmental affairs.

The Walter-Logan Bill, the purpose of which was to put a curb on these agencies, was introduced in Congress and passed by a considerable majority, but it was vetoed by the President in order to await the conclusion of studies and the report of a committee composed of governmental officials, judges, and lawyers appointed to study the subject.

The so-called Attorney-General's Committee on Administrative Procedure made its report early in 1941. Thereafter, a sub-committee of the Senate Judiciary Committee held extensive hearings, but suspended consideration with the imminence of war.

The American Bar Association Committee charged with the duty of the preparation of a bill which will adequately deal with the questions involved will introduce its bill in the next Congress. It is hoped that this bill will become a law and thus end the shadow of bureaucratic or administrative rule.

Ex-President Herbert Hoover, in a speech delivered at Long Beach, California, on August 31, 1945, refers to administrative or bureaucratic forms of government as "communism or creeping socialism." The distinguished speaker further said, "You have seen a form of collectivism in our country. You are familiar with the pre-war growth of governmental power over our own citizens. Have you not seen with your own eyes the flood of bureaucratic violations of liberty and the moral degeneration which comes with the collectivist process? . . . You and I must not be marked as the generation who surrendered the heritage of America."

The foregoing words from the great men of our nation should cause every man who loves the heritage of our country to give serious thought to the evils of the new form of government with which we are now confronted.

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[79]Simmons, *Statement Before House Committee on Administrative Procedure Bills* (1945) 31 A. B. A. J. 438.

Appendix

Named below are boards before which procedure by the aggrieved party is either injunction, mandamus, or *certiorari,* as the facts of the case may demand. The statute allows the losing party no appeal from this group of boards:

Agricultural and Industrial Board. Miss. Laws 1944, c. 241.
Board of Trustees of Department of Archives and History. Miss. Code Ann. (1942) § 6181.
State Athletic Commission. *Id.,* § 8925.
State Bond Commission. Miss. Laws 1944, c. 142.
State Budget Commission. Miss. Code Ann. (1942) § 9103.
State Building Commission. Miss. Laws 1938, c. 55.
Capitol Commission. Miss. Code Ann. (1942) § 8952.
Civilian Defense Council. *Id.,* § 8612.
State Board of Dental Examiners. *Id.,* § 8749.
State Board of Development. *Id.,* § 8936.
State Egg Advisory Board. Miss. Laws 1944, c. 250.
Board of Trustees of State Eleemosynary Institutions. Miss. Laws 1936, c. 180.
State Board of Embalming. Miss. Code Ann. (1942) § 8776.
Board of Trustees Emory Memorial Home.
Board of Registration for Professional Engineers. Miss. Code Ann. (1942) § 8793.
State Forestry Commission. *Id.,* § 6022.
State Board of Health. *Id.,* § 7024.
State Hospital Commission. *Id.,* §§ 7130 *et seq.*
Board of Trustees of Institutions of Higher Learning. *Id.,* § 6724.
Commission on Interstate Cooperation. *Id.,* §§ 3317 *et seq.*
Board of Trustees of King's Daughters' Rescue Home. Miss. Laws 1936, c. 46.
State Library Commission. Miss. Code Ann. (1942) § 6213.
State Livestock Sanitary Board. *Id.,* § 4738.
State Marketing Commission. Miss. Laws 1944, c. 249.
Board of Music Examiners. Miss. Code Ann. (1942) § 6674.
Nurse Examining Board. *Id.,* § 8806.
State Board of Optometry. *Id.,* § 8835.
State Board of Park Supervisors. *Id.,* § 5957.
State Board of Pharmacy. *Id.,* § 8851.
State Pardoning Board. *Id.,* §§ 4004 *et seq.*
Board of Commissioners for the State Penitentiary. *Id.,* § 7923.
State Plant Board of Mississippi. *Id.,* § 4978.
State Board of Public Contract. Miss. Const. 1890, § 107; Miss. Code Ann. (1942) §§ 8961 *et seq.*
State Board of Public Welfare. Miss. Code Ann. (1942) §§ 7218-19.
Board of Public Utilities. *Id.,* § 5538.

State Service Commission. *Id.*, § 7486.
State Temperance Commission. *Id.*, § 6679.
Board of Administration Veterans Farm and Home Act. *Id.*, § 7519.
State Board of Veterinary Examiners. *Id.*, § 8915.

The following are boards from which statutory appeal is allowed the aggrieved party to the circuit court or the chancery court, but the statute does not provide any procedure for the trial of the cause:

State Board of Architects. MISS. CODE ANN. (1942) § 8632.
Board of State Bar Admissions. *Id.*, § 8687.
State Board of Barber Examiners. *Id.*, § 8725.
Board of Supervisors. *Id.*, §§ 8670 *et seq.*
Board of Trustees for the Schools for the Deaf and Blind. *Id.*, § 6942.
State Board of Education. *Id.*, § 6233.
State Board of Election Commissioners. *Id.*, § 3204.
Forestry Commission. *Id.*, § 6033.
State Game and Fish Commission. *Id.*, § 5841.
Highway Safety Patrol. *Id.*, §§ 8076 *et seq.*
Mineral Lease Commission. *Id.*, § 5947.
Mississippi Highway Commission. *Id.*, § 8014.
Insurance Commission. *Id.*, § 5816.
Board of Mississippi Levee Commissioners. Miss. Const. 1890, § 229.
Motor Vehicle Commission. MISS. CODE ANN. (1942) § 8060.
Rural Electrification Commission. *Id.*, § 5502.
State Seafood Commission. *Id.*, § 6049.
Rating Board of the Textbook Commission. *Id.*, § 6634.
State Tax Commission. *Id.*, § 9197.
Unemployment Compensation Commission. *Id.*, § 7400.

The statute provides in the case of the boards named below for an appeal by a losing party to either the circuit or chancery court. The statute also provides the plan of procedure in the trial of a cause in such cases:

State Oil and Gas Board. MISS. CODE ANN. (1942) § 6132.
Board of Yazoo-Mississippi Levee Commissioners. Miss. Const. 1890, § 229.
Public Service Commission. MISS. CODE ANN. (1942) § 7688.
Board of Supervisors. *Id.*, §§ 8670 *et seq.*
State Board of Public Accountancy. *Id.*, § 8906.

Miscellaneous Boards

Board of Trustees of Jefferson Davis Shrine. Miss. Laws 1940, c. 315.
Municipal Courts Commission. MISS. CODE ANN. (1942) § 3788.
Natchez Trace Parkway Right of Way Commission. Miss. Laws 1936, c. 195.
Vocation Education Board. MISS. CODE ANN. (1942) § 8675.

THE AFTER-ACQUIRED PROPERTY DOCTRINE AND ITS APPLICATION IN MISSISSIPPI

*William N. Ethridge, Jr.**

Perhaps no other principle of land law in Mississippi has been so affected by statute and yet has retained so much of the common law theories as has the after-acquired property doctrine. More importantly, this doctrine is involved in something like one-half of the titles in the state.

A deed may have the effect of passing to the grantee a title subsequently acquired by the grantor. Suppose *A* executes a warranty deed purporting to convey to *B* 40 acres of land, and actually *A* has at that time no title to the land. Subsequently *X* conveys the 40 acres to *A*. The Court would hold that the title subsequently acquired by *A* after his deed to *B* flowed on into *B* and became the title of *B*. In other words, a grantor who executes a deed purporting to convey land to which he has no title, or to which he has a defective title at the time of the conveyance, will not be permitted when he afterwards acquires a good title to the land, to claim in opposition to his deed against the grantee, *B*, or against any persons claiming title under *B*.

This doctrine has been based variously by the courts on two reasons: (1) That it would be unjust to permit one, after he has asserted ownership of land and made a deed conveying it to another for a valuable consideration, to obtain by deed an outstanding title and hold it against his purchaser in spite of the deed he has made to the purchaser. (2) That it prevents a circuity of actions; in other words, it prevents the necessity of *B's* having to sue *A* after *A* has acquired a good title to the land.

The doctrine performs the important function of operating as an actual transfer of an after-acquired estate or interest, and the title acquired by the grantor vests in the grantee by operation of law. The courts, for one or both of these reasons, state that the grantor, *A*, is estopped to deny that *B* has good title, or conversely, that he is estopped to assert that he, *A*, has good title. As some of the courts picturesquely put it, "the interest, when it accrues, feeds the estoppel."

I. Conveyances With Covenants

A warranty deed containing a covenant of general warranty, both at common law and under Mississippi statute, operates to estop the grantor from asserting an after-acquired title or interest in the land for the estate which the deed purports to convey, as against the grantee and those claiming under him. The statute states this idea:[1]

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*Wells, Wells, Newman & Thomas; Jackson, Miss.

[1]Miss. Code Ann. (1942) § 843.

"The word 'warrant' without restrictive words in a conveyance shall have the effect of embracing all of the five covenants known at common law, to wit: seizin, power to sell, freedom from incumbrance, quiet enjoyment and warranty of title."

This has been upheld in a number of Mississippi cases.[2]

In *Kaiser v. Earhart*,[3] an insane wife and her husband joined in attempting to convey the wife's separate property. Later the wife died, and the property descended to the husband as the sole heir. The Court held that although the wife's title did not pass by the deed because she was insane, the title to the lands did pass to the grantee in that deed upon the lands descending to the husband after his wife's death.

In another case a father and his six children, two of whom were minors, conveyed to *B* by warranty deed land they had inherited. The two minors were *C* and *D*. On attaining majority, both C and D disaffirmed the deed which they had executed while minors. Afterwards *C* died. The Court held that when *C* died and his estate passed to his heirs, his father and his three brothers who had executed the warranty, the title inured to the benefit of *B*, the grantee in the deed from all of them. The only valid disaffirmance by any of the minors was as to the interest held by *D*.[4]

In *Harrison v. Byers*,[5] *A* conveyed land to *B* by warranty deed. However, at the time of execution of the warranty deed, there was outstanding on the land a properly recorded deed of trust, and theoretically *B* had constructive and actual notice of the existence of the deed of trust. But the deed was not made subject to the deed of trust. Later, the beneficiary, *C*, under the deed of trust foreclosed, and after several intermediate conveyances, *C* conveyed to *A* and wife, allegedly without any consideration passing. The Court held that *A* was estopped to deny title of *B*, and that *B* had full and complete title to the land by operation of law. The apparent reason for the decision as to *A's* wife's interest was the alleged lack of consideration paid by her.

A somewhat similar problem involving tenants in common arose in *Garner v. Garner*.[6] *A* and *B* were tenants in common. *A* conveyed to *B* his, *A's*, undivided share in the property under a warranty covering the entire property. In other words, apparently *A* simply forgot to limit his warranty to the one-half interest which he owned at the time. Nor did *A* make his deed subject to the deed of trust which at the time was outstand-

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[2]Meyers v. American Oil Co., 192 Miss. 180, 5 So. (2d) 218 (1941); Fletcher v. Wilson, 1 S. & M. 376 (1843).
[3]64 Miss. 492, 1 So. 635 (1886).
[4]Andrews v. Anderson, 16 So. 346 (Miss. 1894).
[5]112 Miss. 651, 73 So. 614 (1917).
[6]117 Miss. 694, 78 So. 623 (1918).

ing on the land. It was foreclosed, and *A* bought at the foreclosure sale. The Court held that *A's* entire subsequently acquired title at the foreclosure sale inured to *B's* benefit.

II. Conveyances Without Covenants, Or Quitclaim Deeds

The general rule in the majority of the states is that if a grantor executes a quitclaim deed, or deed without any covenants, he is not estopped from asserting an after-acquired title or interest in the property affected by that deed. This is based on the idea that a quitclaim deed purports to grant only the right, title and interest of the grantor, and not the fee or any particular estate or interest. The only exception to this, under the majority rule, is that if the quitclaim purports to convey a particular interest, it may operate by way of estoppel as to that interest. This would arise under the general rule where *A*, for example, would quitclaim to *B* all of his right, title and interest as the heir of *A's* father, *C*, *C* being deceased at the time. Assume there is some confusion or dispute as to the proportionate interest which *A* received as the heir of *C*, then later ascertainment of the true facts, or later judicial decisions as to the interest of *A* which increased *A's* interest as the heir of *C*. Assume further that at the time of the deed, *A* did not know he had an interest as extensive as he actually wound up with. *A's* quitclaim deed would operate so as to cause whatever interest in *C's* estate *A* received to flow into *B*, the grantee; this would be the only exception to the general rule.

The Mississippi Legislature, however, did not like the common law limitation of the after-acquired land doctrine, and in 1848 passed the following statute:[7]

> "A conveyance of quitclaim and release shall be sufficient to pass all the estate or interest the grantor has in the land conveyed, and shall estop the grantor and his heirs from asserting a subsequently acquired adverse title to the lands conveyed."

The old tale among law students about the darkey insisting upon a *special* warranty rather than a plain warranty does not indicate the legal situation as far as the after-acquired property doctrine in Mississippi is concerned. A special warranty, being nothing but a quitclaim deed, operates so as to convey any after-acquired title of the grantor, under the statute:[8]

> "The words 'warranty specially,' in a conveyance, shall constitute a covenant that the grantor, his heirs and personal representatives, will forever warrant and defend the title of the property unto the grantee and his heirs, representatives, and assigns,

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[7]Miss. Code Ann. (1942) § 846.
[8]*Id.* § 844.

against the claims of all persons claiming by, through, or under the grantor."

Under Section 845 of the Code of 1942, the omission in a deed of any reference to a warranty "operates to transfer the title in possession of the grantor as a quitclaim and release." Section 846 quoted above, applies the after-acquired doctrine to a deed reciting "quitclaim and release."

Section 847 applies the after-acquired doctrine to a deed using words of "grant, bargain and sell:"

> "The words 'grant, bargain, sell,' shall operate as an express covenant to the grantee, his heirs and assigns, that the grantor was seized of an estate, free from incumbrance made or suffered by the grantor, except the rents and services that may be reserved, and also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express word contained in the conveyance; and the grantee, his heirs, executors, administrators, and assigns, may, in any action, assign breaches as if the covenants above mentioned were expressly inserted."

In other words, Mississippi statutes have completely changed the common law doctrine that the after-acquired property principle does not apply to quitclaim deeds. Under Mississippi law, with perhaps two exceptions, any deed, with a warranty, without a warranty, or with any of the usual words operating to convey an interest in land, results in the grantor's after-acquired title as to that interest, whatever it may be, flowing on into the grantee of that deed. The effect of this doctrine upon persons executing quitclaim deeds could have and has, in many instances, reached unfair results. Obviously, there are many times at which a man would be willing to execute a quitclaim deed where he has no or a very slight interest, but where he subsequently may desire to procure the complete title to the property. The proper definition of a quitclaim deed is one which purports to convey only the grantor's present interest or estate, and so the practical result of the above-quoted Mississippi statute is that a quitclaim deed conveys not only the grantor's present estate, but his future estate in the lands.

There are, however, two probable exceptions to the rule:

(1) No recent cases have adjudicated this exception, but it would appear that if the quitclaim deed is drafted in terms so as to purport to convey "all my right, title and interest which I presently have in and to" said lands, the effect of that deed would be to convey only the interest in the lands which grantor had at the time of the conveyance. Stated differently, it is likely that a quitclaim deed in Mississippi conveying only grantor's present interest would not convey an after-acquired title, despite the terms of the above quoted statutes. I say this for several reasons: It is the general rule in other states, even where there are statutes somewhat

similar to Mississippi. In *McInnis v. Pickett,*[9] Chief Justice Campbell said that "the estoppel is co-extensive with the estate, right or interest which a conveyance *purports to pass.*" (Italics added). The test, according to this case, is what estate or interest the conveyance purports to pass. If a person purports to pass only the interest *which he has,* then he would seem to be bound only by an obligation to convey what he has at the time of the conveyance, and is not affected by any subsequently acquired interest. In *McInnis v. Pickett,* the plaintiff conveyed all of her right, title and interest in the estate of her father, deceased. The Court said that plaintiff was not estopped from setting up her title to the land by descent cast upon her by the subsequent death of her brother and sister. In *Mitchell v. Woodson,*[10] Mitchell had executed a contract in which he agreed to convey to Woodson "all the right, title or interest he had of, in or to the premises by quitclaim deed." The Court held that Mitchell had simply contracted to convey the interest he had at that time, and that he had a right to acquire for himself an independent title to the land. Both of these cases were decided after Section 846 was enacted.[11]

(2) A second possible exception to the principle that a quitclaim or warranty deed carries the after-acquired title of grantor, may be found where the grantee knew of the deficiencies in the grantor's title. Since the traditional doctrine of estoppel is based upon ignorance and prejudicial action in good faith by the grantee, this exception would seem logically to follow. However, there are no Mississippi decisions so holding.[12]

III. Persons To Whom Estoppel Is Available

In the absence of fraud or an attempt to evade creditors, it is settled in Mississippi that where a husband has executed a deed with covenants of warranty, the acquisition of an adverse title by his wife does not inure to the benefit of the husband's grantee, unless fraud can be shown.[13]

Mortgagors who are smooth enough to talk lenders of money into putting two mortgages on the old homestead are in a less fortunate situation. Suppose *A* executes a first deed of trust to *B,* and a second deed of trust to *C.* Upon failure to meet the payments under the first deed of trust, *B* forecloses and buys the property at the trustee's sale. Through various intermediate conveyances from *B,* (the purchaser at the foreclosure sale), the foreclosure title vests in *A.* Ordinarily the foreclosure of the first deed of trust would cancel and cut off the second deed of trust, but the Mississippi Supreme Court has held that the title reacquired by the

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[9]3 So. 660 (Miss. 1888).
[10]37 Miss. 567 (1859).
[11]See also Bramlett v. Roberts, 68 Miss. 325, 10 So. 56 (1890).
[12]See 31 C. J. S., Estoppel, § 21.
[13]Carter v. Bustamente, 59 Miss. 559 (1882); Cameron v. Lewis, 59 Miss. 134 (1881).

grantor *A* after foreclosure of his deed of trust inures to the benefit of the second deed of trust owned by *B*.[14]

The after-acquired property doctrine is applicable, it would seem, to any estate or right affected. There are no Mississippi cases specifically applying it to a conveyance of minerals or royalties, but this has been done elsewhere, and, since the reasons for the doctrine are the same and minerals are an interest in land, there seems little doubt that the Mississippi Supreme Court would hold that the after-acquired property doctrine applies to minerals. This would probably be followed in a conveyance of royalties.[15] It has been applied in a conveyance of timber.[16]

Section 831 of the Code of 1942 provided that any interest in land possessed presently or in the future may be the subject of conveyance. Although there are no Mississippi decisions applying the after-acquired property doctrine to this situation, it is believed that where a prospective heir conveys the estate which he expects to inherit from his father, who is living, and he later inherits, he is estopped from claiming the title subsequently acquired; it inures to the benefit of the grantee or his successors. This would also apply to one receiving lands by will.

The doctrine would also apply where *A* executed a conveyance, not having any title to the property, and subsequently acquires a tax title, either through a sale for taxes or a patent from the State. The tax title would inure to the benefit of the grantee of *A's* deed.

The Supreme Court of the United States has held that where the State claims title under a deed, and has attempted to patent it to an individual at the time at which it did not actually have the title, the State is subject to all of the estoppels running with a subsequently acquired title in the lands.[17] Also, if an individual is entitled to a grant or patent of land from the State or the Federal Government, the legal title acquired by him through the actual issuance of the patent will vest in his grantee.

If a person as an agent for another, executes a deed to lands, and he subsequently acquires in his personal capacity as an individual the title to the land, it is generally held that the after-acquired property doctrine does not apply, because he was acting in two capacities. In other words, the title he acquired as an individual does not flow with the deed he executed as an agent for another. The rule would be similar if he were acting as a trustee for another person, and subsequently received title to the land as an individual and not as a trustee. Of course, if fraud or bad faith could be shown, the Court would no doubt apply the after-acquired property doctrine. There are no Mississippi cases dealing with this situation.

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[14]Martin v. Raleigh State Bank, 146 Miss. 1, 111 So. 448 (1927).

[15]See Corley v. Myers, 22 So. (2d) 234 (Miss. 1945); Cook v. Farley, 198 Miss. 638, 15 So. (2d) 352 (Miss. 1943.)

[16]Anderson v. Wilder, 83 Miss. 606, 35 So. 875 (1904).

[17]Carver v. Jackson, 4 Pet. 1, 7 L. ed. 761 (1830).

In *Meyers v. American Oil Co.*,[18] the Court recently considered a situation where the defendant executed a deed of trust covering land to which he subsequently acquired title. His wife did not join in the deed, he did not then own it, and it was not his homestead. Defendant argued that because he, the husband, had no title to the property at the time he gave the deed of trust, and because afterwards his family actually moved upon the property and were making their homestead at the time the husband acquired a subsequent title, the deed of trust should be considered by the court *as of the date of the subsequent acquirement* of the title by him in order to protect his wife's homestead interest. Therefore, defendant argued, the deed of trust was void because there was no joinder in its execution by the wife. The Court denied this argument and applied the doctrine.

A few general observations: It is not necessary that the conveyance should have been made for a valuable consideration; a nominal consideration is enough. The rule also applies whether the party assuming to convey title acted under an honest mistake or committed fraud. It also applies whether the title subsequently acquired is legal or equitable.

If any of the above-mentioned factual situations exists, the estoppel against the grantor to assert the after-acquired title is held to vest such title in the grantee by operation of law, automatically and without the necessity of any litigation, and to be effective also against bona fide purchasers of the title.[19]

[18]192 Miss. 180, 5 So. (2d) 218 (1941).
[19]Edwards v. Hillier, 70 Miss. 803, 13 So. 692 (1893).

INSANITY AS A DEFENSE IN CRIMINAL CASES

*Ed. H. Green**

To layment the plea of insanity as a defense is often regarded as the last refuge of a criminal lawyer in an effort to save his client from paying the extreme penalty for crime. The physchiatrist views insanity as a defense from the standpoint of a scientist. He sees in the accused a person who may be psychopathic, and therefore unable to co-ordinate properly his actions with his will power and his moral convictions. Hence the doctor who makes this his specialty may look on the accused as one who needs medical and psychological treatment rather than punishment. To the court a criminal trial is a search for truth. In order to ascertain the truth, certain well-defined rules of evidence must be followed. The law is not an exact science; rules of evidence are the product of human experience, and are subject to change as society advances in the understanding of human problems.

Where the defense is predicated on insanity, the principal inquiry during the trial is concerned with the mental responsibility of the accused, to determine whether he should be held legally accountable for his actions. The essential element of most crimes and all felonies is criminal intent. If by reason of insanity a person is found to be incapable of forming such an intent, he cannot be held legally accountable. The Supreme Court of Mississippi has laid down the principle that a man is accountable for his actions if he has sufficient reason and capacity to distinguish between right and wrong as to the particular act he is then doing. If he has sufficient mental capacity to realize that the act in which he is then engaged is wrong and illegal, then it necessarily follows that he has sufficient mentality to form the intent to commit the act, and therefore he is legally responsible. It is essential that the phrase "the act that he is then doing" be not overlooked. A person may have a warped and depraved mind and may have committed many crimes, but if he knows that what he is then doing is wrong and unlawful, he is legally accountable for that act. This was the basis of the decision in *Eatman v. State*.[1] The testimony in that case showed that the defendant had sufficient mental capacity to distinguish between right and wrong, but that he persisted in the commission of illegal acts. The Supreme Court held that because he had an inclination or an impulse to do wrong, the question of the insanity of the defendant was not a factual question to be determined by the jury.

Our next inquiry is: when does the sanity of the accused become a question for the jury? The law presumes every person to be sane and responsible for his acts. This presumption is based upon common sense,

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*Circuit Judge, Eleventh Circuit Court District of Mississippi.
[1]169 Miss. 295, 153 So. 381 (1934).

and is necessary in all transactions between individuals. When testimony is offered that the accused does not know the difference between right and wrong, this presumption fades from the case, and the sanity of the accused becomes a factual question to be decided by the jury under proper instructions, the burden being upon the State to prove beyond a reasonable doubt the sanity of the accused, as well as every element of the crime. This is a reasonable and just rule, and is in keeping with the long history of the Mississippi Supreme Court, which has so charted its course as to make it a fundamental right of every person charged with crime to present all legal defenses to the jury.

In 1928 the Mississippi Legislature enacted a law which deprived the defendant in a murder case of the right to interpose insanity as a defense.[2] In *Sinclair v. State*[3] this statute was held to be unconstitutional. Judge Griffith in a specially concurring opinion demonstrated with great clearness and precision the manifest injustice and inhumanity of such a statute. The true test as to when insanity becomes a defense in a criminal case is laid down in *Waycaster v. State*.[4] In that case testimony was offered which definitely raised the question as to whether the defendant was sane at the time of the homicide. This testimony was excluded by the lower court, and in reversing this case the Supreme Court held that when testimony is offered either by the State or the defendant, sufficient to raise a reasonable probability of defendant's insanity, or a reasonable doubt of his sanity, then it is incumbent upon the state to prove the sanity of the defendant beyond every reasonable doubt and independent of the presumption of sanity. When the issue of insanity is raised by the state, it is not precluded from offering testimony that the defendant is sane. It is true that a party cannot impeach the credibility of a witness, but a party introducing such a witness may offer testimony that contradicts him, where the object of such testimony is not to impeach or discredit the witness, although that may be an incidental and consequential effect.[5]

The doctrine of irresistible impulse has given the Court much concern. We must recognize that there are human beings who suffer from delusions or lesions of the will that create an impulse to do wrong. The religion, conscience, and environment of the individual interpose a deterring influence; the restraint of law and the certainty of punishment constitute an even more cogent deterrent. When these influences fail and a crime is committed, then the accountability of the individual becomes a proper subject of inquiry. It is necessary that society be protected from the depredations of its members. If the individual is mentally responsible, then he should be punished, but if he is not, then society cannot exact punishment

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[2]Miss. Laws 1928, c. 75; repealed by Miss. Laws 1932, c. 237.
[3]161 Miss. 142, 132 So. 581 (1931).
[4]185 Miss. 25, 187 So. 205 (1939).
[5]Fairley v. Fairley, 38 Miss. 280 (1859).

The Supreme Court does not give recognition to the doctrine of irresistible impulse *per se*. In the final analysis, the accountability rests on the right-and-wrong test. If that irresistible impulse springs from a disease existing to so high a degree that it overwhelms the reason, judgment, and conscience of the accused, so that he cannot distinguish between right and wrong at the time of the occurrence, then the crime is not punishable.[6]

The most celebrated trial in our state in which this doctrine was invoked was *Smith v. State*.[7] In this case the question of the sanity of the accused was submitted to the jury under proper instructions. There was testimony that Smith was suffering from a delusion that impelled him to kill Laurent, but when the right-and-wrong test is applied, there is no doubt that this case was properly affirmed. As was pointed out in that case, this test is not infallible, and may some day be rejected, but it is the best test yet devised for determining the accountability of the accused.[8]

The decisions are replete with the controversy that arises over the introduction of the psychiatric method in court. The scientist is not so much interested in abstract justice as he is in the treatment and amelioration of the disease. He says that justice cannot be applied to a broken mind any more than it can to a broken arm. Those charged with the administration of justice are primarily concerned with the responsibility of the individual, for responsibility means punishability. Rules of evidence have been evolved whereby responsibility may be gauged. We cannot arbitrarily disregard these rules; neither can we say that the introduction of the psychiatric method in the trial of cases is a travesty on justice. The Court in its search for ultimate truth and justice may well use the qualified psychiatrist as an indispensable aid in determining the accountability of the individual charged with crime, without deviating too far from the established rules of evidence.

In every case where the insanity issue is presented, the trial court is confronted with the serious question of preserving every right of the accused growing out of such issue. If there is a probability that the accused was insane at the time of the occurrence, then there may be a probability that he is insane at the time of trial, and therefore incapable of conducting his defense. The probability that the defendant was insane at the time of the trial was made to appear in the recent case of *Carter v. State*[9] and the Court held that where the mentality of the accused is probably such that he is incapable of making a rational defense, the trial should not be proceeded with until that question is investigated, and it be made to

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[6]Cunningham v. State, 56 Miss. 269 (1879).
[7]95 Miss. 786, 49 So. 945 (1909).
[8]On the problem of irresistible impulse, see Note (1931) 70 A. L. R. 659.
[9]21 So. (2d) 404 (Miss. 1945).

appear that he is sufficiently rational to conduct his defense. The opinion does not set out how such an investigation should be conducted. The trial court could retire the jury and take testimony as to the mental responsibility of the accused, or it could order a mistrial in the case and allow a sanity hearing. Either of these methods would be very unsatisfactory. Perhaps a practical solution of such a problem would be a provision of law requiring counsel for defendant to make a motion before trial that accused was insane at the time of the occurrence, or that he is still insane and unable to conduct his defense. The court should then be empowered to transfer the accused to a proper institution where he would be thoroughly examined by qualified psychiatrists, whose finding would become a part of the record. If the defendant is insane he should be committed to an institution for treatment, and if sane, his trial should be proceeded with accordingly.[10]

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[10]Although this is somewhat of a departure from the subject, I wish to give expression to a thought that has become crystallized through years of experience in the courts. The primary objective for the enforcement of the criminal laws is the protection of society. To safeguard society it is necessary that there be a changed attitude toward punishment of people convicted of crime. It is self-evident that penitentiaries do not reform, because too many habitual criminals are turned loose. Many people who serve terms in the penitentiary come out worse than when they entered. To bring about an amelioration of these conditions, the profit motive should be abolished from our penitentiary system, and more thought and study given to the reformation of human beings. Many things can be done to bring about this objective. The first step taken should be the creation of a board composed of legal experts, trained investigators, psychiatrists, and penologists, who should be well paid, and who should devote their entire time to the study and investigation of all inmates of the penitentiary. This board should have the sole responsibility for the granting of paroles, and before a parole is granted, a thorough examination of the convict and study of his case history should be made, and the board should be satisfied that the convict can take his place in society as a law-abiding citizen. If the slightest mental disorder is detected that may bring about a recurrence of crime, the parole should be denied.

FARISH v. STONE, CHAIRMAN, STATE TAX COMMISSION*

V. J. Stricker†

The Commissioner proceeded under certain statutes[1] which for the State it was contended conferred upon him an authority which is absolute. Accepting the interpretation for the sake of discussion, it is the purpose here to point out that it is beyond the power of the Legislature to confer such authority, and any attempt thereunto is void.

It is inherently void.

Let it be assumed (and it is assumed) that this Commissioner has no desire to be other than fair, but (aside from the fact that he is not a judge, and has not the organized facilities for judicial procedure) the assumption of his fairness can in no wise be extended to his successor. The evil is in the system, and an evil system will breed evil-doers. And evil-doers will extort and plunder and oppress their victims in exact proportion to the opportunity given them.

The statute in question is without due process of law in that it provides for no notice to defendant. That is its first and fundamental iniquity, and in this it is arbitrary and capricious and without reasonable relation to a legitimate end. As early as *Donovan v. Mayor and Council of Vicksburg*,[2] it was held that "a law depriving a citizen of his property without notice or trial, and without opportunity to protect his rights, is void." "A judgment without notice is void."[3]

"The legislature cannot provide for the infliction of a penalty and its collection by summary process, without a judicial proceeding adjudicating the liability."[4]

Were the Commissioner to notify the defendant in a given case, and allow him a hearing, it would be a mere gratuity, and would not help the situation in the least. The point is that the statute does not require the notice to be given, and it is the statute which is void. The giving of notice by the Commissioner under such conditions is an act of benevolence,

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*This article is an opinion handed down in the above-styled cause by Judge Stricker in the Chancery Court of Hinds County. The Chairman of the State Tax Commission cancelled the permit issued to Mrs. Alice Johns Farish for the sale of light wines and beer, without giving her notice or hearing. The Commissioner in this opinion is enjoined from interfering with complainant's business. Although it is not the *Journal's* customary practice to reprint court opinions, Judge Stricker's decision is published here in the belief that it will be of universal interest.

On November 26, 1945, the decision in this case was reversed by the Supreme Court on appeal by the Tax Commission. The Editors.

†Chancellor, Fifth Chancery Court District of Mississippi.

[1]MISS. CODE ANN. (1942) §§ 10213 *et seq.*

[2]29 Miss. 247 (1855).

[3]Brown v. Board of Levee Comm'rs, 50 Miss. 468 (1874); Jack v. Thompson, 41 Miss. 49 (1866).

[4]McBride v. State, 70 Miss. 716 (1893).

and tyranny always begins with benevolence. After a time there is no notice, and ruin comes as a noon-day surprise.

The Act is also without due process of law in that it admits of no judicial review. "Due process" does not necessarily mean that a jury shall try the case, but it does mean, in connection with Section 24[5] of the Constitution, that the right of judicial review shall remain inviolate. It was under Sections 14[6] and 24 of the organic law, in connection with the general powers of this Court, as derived from the Constitution and the common law, that the case reached here at all. It came from the circuit judge of the Ninth District, and the State itself raised no question of the Court's jurisdiction.

If the Court had jurisdiction, what did it have it for, except to review the record of the proceedings before the Commissioner? But there was no record. The judge called for the record, but it was explained that there was no record. What then could the Court review? It could not try the question anew, and on the facts, as to whether the petitioner was guilty of what the attorneys said the Commissioner proceeded against her for.

The Court's aid was invoked, but it was without factual subject-matter to begin a hearing. It had either to turn its back upon the case, or proceed to examine the law out of which the situation was said to have arisen. The predicament itself, as outlined, is illustrative of the protective principles of constitutional government: No person shall be deprived of life, liberty, or property without due process of law, and, all courts shall be open, and every person for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law.[7]

The injury done the petitioner in her goods, person and reputation was, as asserted by her counsel, the accusation, condemnation, and deprivation of her permit, without right of notice, or hearing, or remedy through appeal. Upon these propositions we could only examine the statutes under which counsel for the taxing department claimed plenary power in the Commissioner to act. Whether there are statutes which confer such power, as already observed, is beside the question. If such statutes exist they are without validity, and compliance with them is no added element of authority in the Commissioner.

In the same series of enactments there are ample provisions for legal procedure, which would take precedence even if the issue were doubtful. There was no reason why the evidence in the possession of the Commissioner could not have been presented to a law court in the City of

[5]"All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay."

[6]"No person shall be deprived of life, liberty, or property except by due process of law."

[7]Miss. Const. 1890, §§ 14 and 24.

Vicksburg, insofar as the legitimate contemplation of the law itself is concerned. Was the Department doubtful of a conviction? The courts of Warren County are the courts of the people, and the petitioner was entitled to the benefit of an acquittal in those courts if in due course of law the case should have turned out that way.

An illustration of the principle sought here to be applied will be found in Sections 8774 and 8775[8] of the Code of 1942. In *Mississippi State Board of Dental Examiners v. Mandell,*[9] this Court gave relief by injunctive process, as sought here. The case had been appealed to this Court as provided by statute, and was tried here on the record made at the hearing before the Board of Dental Examiners. The relief as prayed for was granted, and on appeal to the Supreme Court this Court's action was affirmed. Where would that dentist have been if no Court had been open to him? Other cases of the kind have found refuge in this Court, and agencies of the Federal Government itself have been "slowed down" here.

One of the eight volumes of the Code of 1942, the sixth one, is given almost wholly to the subject of public agencies. These agencies have grown in variety and number to such proportions that the two Capitol buildings will not hold them, and it is now proposed to erect another structure big enough to accommodate them, and save the state the annual outlay for rent which office space for these departments is costing it. Were all these "set-ups" independent of the courts, and above the law, the professional life of the state, and many of the trades, would be in jeopardy every hour. In fact all avocations could be licensed and brought within the system until it became a network of political overlords, and their feudalistic retainers. The case at bar could have been a precedent for it, and precedent for break-down in government is at times all that is required.

The procedure therefore prescribed by statute for these agencies is in line with that for dentists above referred to, and all reflect the policy of judicial review when the rights of citizens and their reputations are at stake. It was a recognition of these principles that influenced the Attorney-General in an official statement in the Code itself to say:[10]

> "I am withholding my opinion for further study and consideration on the question of whether the State Tax Commission has authority to revoke a permit authorizing the retail sale of beer without the holder of such permit having been first convicted of a violation of the statutes prohibiting the sale of intoxicating liquors, or some other criminal statute of the state."

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[8]These two sections provide that the State Board of Dental Examiners shall have power to revoke licenses only after the accused have had notice and a hearing, and the right of appeal to the chancery court is given.

[9]——Miss.——, 21 So. (2d) 405 (1945).

[10]Miss. Code Ann. (1942) § 10213.

Let it be observed that the wine and beer permits are issued for life, or during good behavior, and therefore acquire the character of property, in the particular elements that are incident to them.

In *Cherry v. Bivens,*[11] a Negro fraternal association case, involving the power of the Lodge to expel one of its officers, the Supreme Court observed that,[12]

> "It is a fundamental principle that a person is entitled to notice and hearing before being deprived of his rights. Under the Constitution of Mississippi, Section 24, every person for an injury done him in his lands, goods, person, or reputation, is entitled to remedy in due course, and by the Mississippi Constitution, as well as the Fourteenth Amendment to the Federal Constitution, no person can be deprived of life, liberty or property, except by due process of law. And while a fraternal society, social or religious organization, is not within the letter of the provision named, yet the state has established, as a matter of public policy, the rights mentioned, and the positions in such organizations are valuable rights pertaining to the liberty of the citizen, and affects his reputation if he is expelled from such organization, or deprived of his rights without an opportunity to be heard. It would be fundamentally unjust to deprive a person of these offices in such organizations, and to have his reputation affected by the fact that he was expelled, or his rights forfeited by superior officers."

The machinery of the state and the counties is amply sufficient to discover and convict wine and beer distributors in proper cases, and in due course of law. There is certainly no valid reason why jurisdiction of the criminal elements of this legislation should be removed from the orderly and organized tribunals of the state government.

What is there in such business that lifts it above the estbalished usage of the country, and makes even its illegal aspects incompatible with the purpose of the courts, and the available facilities of the law of the land?

If the traffic is an incorrigible and unmanageable evil, it is unworthy of the legislature to compromise with it. If it be not such, its restrictions should be reasonable, and its violations subject to the same control as that of other offenses against society and the state. The legislature has given these beverages the status of commodities, and the authority to handle them should not be revoked except upon conviction in due course of law, and in judicial tribunals established by the people.

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[11]185 Miss. 329, 187 So. 525 (1939).
[12]185 Miss. at 339, 187 So. at 527.

"The powers of the government of the State of Mississippi," found in Section 1 of our Constitution, according to experienced authority, means all of the powers of the government. Any attempt on the part of the legislature to vest judicial power in an administrative office is a prostitution of the legislative function.

Whatever may be defined as "due process of law" in a given society, there is one requirement in our system which no expediency can transcend, and no emergency can transgress. The party proceeded against must have notice under law, and a chance to be heard, and an open road at last to the Courts. It is this practice which has held our country high in its greatness, and it is this principle (this natural and intuitive principle, with its objectives of truth and justice) toward which humanity is turning throughout the world today. These are inviolable maxims of political morality, and when they are abandoned liberty is betrayed, and tyranny is our lot again.

That we have been recklessly exposed to this danger through the bureaucracy of the National Government as designed by the late regime none can deny, but God grant that in our time, and in our land, the threatened and unspeakable calamity may be prevented.

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NOTES

THE DOCTRINE OF THE LAW OF THE CASE

A principle of law which has become settled by a series of decisions is binding on the courts and should be followed. This rule, which is the rule of *stare decisis,*[1] is based upon considerations of public policy and expediency.[2] The application of the rule is determined in each case by the discretion of the court, and previous decisions need not be followed where manifest wrong is done. Although an established rule will not be departed from except where necessary, former doctrines which the courts now regard as erroneous, although established by previous decisions, are not usually followed.[3] The doctrine of *stare decisis* is a flexible doctrine, with ultimate justice as its aim, although its operation depends upon the elements of "certainty, stability, equality, and knowability."[4]

A companion doctrine, that of *res judicata,* applies when a court has finally determined a litigated cause, the judgment being conclusive between the parties to the suit and their privies in respect to every fact which might properly be considered in reaching a judicial determination of the controversy, and in respect to all points of law then decided.[5] Public policy and the interest of litigants require that there be an end to litigation, which could not be accomplished without the doctrine of *res judicata.* This doctrine rests on the ground that the party to be affected, or some other with whom he is in privity, has litigated, or has had an opportunity to litigate the same matter in a former action; and to prevent harrassment of his opponent, as well as public expense, he should not be permitted to relitigate it.

The outstanding differences between *stare decisis* and *res judicata* are that under the doctrine of *res judicata* only parties and persons in privity with them are bound, while the doctrine of *stare decisis* governs decisions of the same question in actions between strangers to the record;[6] and, while *stare decisis* is applied with discretion, *res judicata* admits no exception. However, there is a resemblance between these two doctrines.

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[1]State v. Brantley, 113 Miss. 78, 74 So. 662 (1917); Moss Point Lumber Co. v. Harrison County, 89 Miss. 448, 42 So. 290 (1906); 14 AM. JUR. COURTS, §§ 59 *et seq.*

[2]Lonstorf v. Lonstorf, 118 Wis. 159, 95 N. W. 961, 962 (1903) ("Courts should ordinarily bow to the consideration that certainty of the law is more essential to justice than absolute correctness.")

[3]Adams v. Yazoo & M. V. R. R., 77 Miss. 194, 28 So. 956 (1899). See State v. Silvers, 82 Iowa 714, 47 N. W. 772 (1891) (mere doubt as to the correctness of the former decision is not ground for changing it, and changing decisions does not always remove doubt). For application of this theory to the law of the case doctrine, see White v. Higgins, 116 F. (2d) (C.C.A. 1st, 1940), cited *infra* note 21.

[4]VON MOSCHZISKER, STARE DECISIS, RES JUDICATA, AND OTHER SELECTED ESSAYS (1929) 7.

[5]*Id.* at 32-33.

[6]30 AM. JUR. JUDGMENTS, § 169.

Both are rules of public policy intended to maintain stability in human relations by giving repose to litigation, and both operate to prevent the constant reconsideration of settled questions, although they operate with different scope and effect.[7]

The doctrine known as the law of the case is that a matter once adjudicated upon an appeal will not be reopened upon a later appeal of the same case before final adjudication. This doctrine has developed with the doctrines of *stare decisis* and *res judicata,* and the principles underlying these doctrines have provided the basis for the law of the case. All three doctrines are generally said to be applications of the concept of estoppel to court decisions,[8] although each doctrine has its own peculiar application and is based upon different considerations.

The law of the case doctrine is one of court practice, and is not founded in legislative enactment. Some courts base it upon *stare decisis* and others upon *res judicata.*[9] Although the doctrine has been given strict application, there has been a tendency to make exceptions where the first decision clearly appears erroneous.[10]

Some courts have questioned the principle, saying that it could not be based upon either *stare decisis* or *res judicata.* Arising from similar considerations of policy, the doctrine should not have to be supported upon either. Admittedly, it is not the same as *stare decisis,* because that principle applies to decisions involving different parties. And it is not the same as *res judicata,* because this assumes final adjudication.[11] It bears closer analogy to *res judicata,* the main distinction being that the law of the case applies before final adjudication. *Res judicata* prevents relitigation between parties after final judgment is reached, but the law of the case applies before the case is brought to final judgment and its purpose is to implement the final adjudication by preventing reargument on matters of law as applied to certain facts in the case.[12]

In the multitude of cases which hold that the former decision is binding as the law of the case on subsequent appeal, many are cases where the law applied upon first appeal is in complete harmony with the views of

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[7]State Hospital v. Consolidated Water Co., 267 Pa. 29, 110 Atl. 281 (1920); Von Moschzisker, *op. cit. supra* note 4, at 31-32.

[8]15 C. J. Courts, § 357. *But see* 3 Freeman, Judgments (5th ed. 1925) § 630. (*Stare decisis* involves no element of estoppel.)

[9]McGovern v. Kraus, 200 Wis. 64, 227 N. W. 300 (1929) (modifies for the first time in this jurisdiction, the strict *res judicata* application of the doctrine); Hastings v. Foxworthy, 45 Neb. 676, 63 N. W. 955, 34 L. R. A. 321 (1895) (good general discussion of underlying principles).

[10]Southern Ry. v. Clift, 260 U. S. 316 (1922); Sala v. Crane, 38 Idaho 402, 221 Pac. 556 (1923) (rule given flexibility); Bealey v. Smith, 158 Mo. 515, 59 S. W. 984 (1900) (exceptions indicated).

[11](1909) 22 Harv. L. Rev. 438.

[12]Moore and Oglebay, Stare Decisis and Law of the Case (1943).

the court on second appeal.[13] If the former opinion is the correct one, it will be followed without depending upon the rule. But when the court feels that it has applied the incorrect rule, or that for any reason its decision should not be applied on second appeal, the true test of the doctrine is made. It has been said that the doctrine only becomes important when the former rule is deemed erroneous.[14]

Most of the earlier cases applied the doctrine strictly, regardless of error in the first decision.[15] In *Dewey v. Gray,*[16] an early California decision, the court considered the principle of law applied on first appeal incorrect. Refusing to alter the decision, it said:

> "The latter portion of that decision is in abrogation of one of the plainest principles of law; and if this case was a new one, I would not hesitate to overrule it. But legal rules deprive us of the power to do so. The decision having been made in this case, it has become the law of the case, and is not now the subject of revision."[17]

In the case of *Roberts v. Cooper,*[18] the Supreme Court of the United States stated a similar application of the doctrine, and said that there would be no end to a suit if each litigant could by repeated appeals compel the court to "listen to criticisms on their opinions or speculate on chances from changes in its members."[19]

The theory justifying rigid application of the doctrine is the necessity of finally determining litigation between parties. In ending litigation, there is a public interest as well as an interest between the parties, and, as in *res judicata,* public policy demands that a matter once adjudicated be put to rest, regardless of whether it is later considered an incorrect adjudication.[20]

In the courts not considering the doctrine inflexible, it is not abolished or discarded. Discretion is merely given to the courts to decide those very unusual cases where the rule should not be applied. *Res judicata* precludes any further consideration regardless of the injustice of a decision. If this is considered the only basis of the doctrine of the law of the case, courts will never reopen any matter upon second appeal. In jurisdictions allowing

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[13]See, *e.g.,* Mississippi cases cited *infra,* note 41.
[14]Tally v. Ganahal, 151 Cal. 418, 90 Pac. 1049 (1907).
[15]Thompson v. Maxwell Land Grant and R. R., 168 U. S. 451 (1897); Corning v. Troy Iron and Nail Factory, 15 How. 451 (U. S. 1853); Martin v. Hunter, 1 Wheat. 304 (U. S. 1816); United States Annuity and Life Ins. Co. v. Peak, 129 Ark. 43, 195 S. W. 392 (1917); see also the Mississippi cases cited *infra,* note 40.
[16]2 Cal. 374 (1852).
[17]*Id.* at 377.
[18]61 U. S. 969 (1857).
[19]*Id.* at 973-974.
[20]Note (1919) 1 A.L.R. 1267, 1270.

relaxation in certain cases, the rule is addressed to the discretion of the court, and the principal problem has been one of declaring a standard by which exceptions may be made. The terminology used has included such phrases, in regard to the former decision, as "clearly unjust," "manifestly wrong," and "inadvertent application of incorrect principles." The problem of discretion lies in which situations to apply the standards.

Ordinarily, mere doubt as to the correctness of the former decision is not sufficient,[21] and the rule should not be relaxed where there appears no circumstance other than mere conflict of views or divided precedent. By way of example, assume a matter of first impression in a court which has been decided in other states. Should the other courts have an equally divided conflict in their application of the law, the mere fact that the court adopted one construction would not necessarily make the discarded construction "manifestly erroneous." However, should it, through inadvertence, adopt a rule of law which had no support, and was contrary to overwhelming precedent, or was based upon mistake of fact, the application of the doctrine may be relaxed. Naturally, if the court adopts a change of attitude, even in the face of *stare decisis,* the latest view is the "correct" one and the former view "wrong." But the problem is whether the law of the case should be modified in the absence of some additional factor.

In all of the earlier Federal cases the doctrine was applied with the strictness of *res judicata.*[22] While the rule now is ordinarily applied strictly by the Federal Courts, exceptions have been allowed. To relax the rule, cases must be clearly considered exceptional, and this does not frequently happen.[23]

An interesting case in which a Federal court departed from the rigid rule, because of exceptional circumstances, was *Johnson v. Cadillac Motor Car Co.,*[24] in which a Circuit Court of Appeals changed its former opinion upon a second appeal. This case involved injury to the driver of an automobile, because of a defective spoke in one of the wheels. In a suit by him against the manufacturer of the car, the court on first appeal refused

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[21]White v. Higgins, 116 F. (2d) 312, 317 (C. C. A. 1st, 1940) ("mere doubt on our part is not enough to open the point for full consideration. Often when the decision is originally entered we have doubts enough.")

[22]See cases cited *supra,* notes 15 and 17.

[23]That there are any exceptions at all to the rule in federal courts is largely due to the theory expressed in Messinger v. Anderson, 225 U. S. 436 (1912). The phrase "law of the case" was said to merely express the practice of the courts generally to refuse to reopen what had been decided, and was not a limit to their power. *Cf.* Cochran v. M. & M. Transportation Co., 110 F. (2d) 519 (C. C. A. 1st, 1940). In White v. Higgins, 116 F. (2d) 312 (C. C. A. 1st, 1940), cited *supra* note 21, this theory was given recognition, and though agreeing with it, the doctrine was strictly applied in the particular case.

[24]261 Fed. 878 (C. C. A. 2d, 1919).

recovery because there was no contractual relation between the parties. In its first opinion the court said that persons manufacturing inherently dangerous articles were liable in tort to third persons, unless reasonable care was proved, but persons manufacturing articles not inherently dangerous were not liable to third persons unless there was fraud or willful injury. Meanwhile in the New York Court, in the famous case of *McPherson v. Buick Motor Co.*,[25] Justice Cardozo had rendered an opinion in a similar situation, holding liability.

The Circuit Court of Appeals on second appeal of the same case, impressed with the view of the New York Court, felt that it stated the correct view of the law. But in order to apply its reasoning, the doctrine of the law of the case had to be considered less strict than the earlier cases had indicated. Because of the peculiar nature of the case the court felt that it was justified as an exception to the rule. Not without regarding authority to the contrary, it followed the rule of *Cluff v. Day*,[26] stating:

> "There is no iron rule which precludes a court from correcting a manifest error in its former judgment, or which requires it to adhere to an unsound declaration of the law. . . . But the cases in which this will be done are exceptional and the power should be sparingly exercised. Where by inadvertence a settled principle of law is supposed to have been overlooked, or a rule of property violated, the court affords by its rule an opportunity to have its attention again called to the matter before final judgment is entered."

The fact that by its nature, a defective automobile was capable of injuring many people, the necessity of having the correct policy in regard to such an important situation outweighed the policy of terminating litigation in the particular case.

The court that decided the *Cadillac* case, in deciding *Cromwell v. Simons*[27] only three years later, re-emphasized the importance of the doctrine and refused this time to relax it, because the situation was not considered sufficiently exceptional.[28] While refusing to depart from the rule, the court still felt the duty to state its view of the law involved and point out that it disagreed with the decision on former appeal. The question was whether certain evidence at the trial justified submission of the case to the jury. It affected only the parties to the case, and there could be no mischievous policy which would harmfully affect many people. Therefore, the policy of ending litigation outweighed any other policy, and the law of the case prevailed.

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[25]217 N. Y. 382, 111 N. E. 1050 (1919).
[26]141 N. Y. 580, 36 N. E. 182, 183 (1894).
[27]261 Fed. 663 (C. C. A. 2d, 1922).
[28]The court also did not deem change of court personnel a sufficient reason for relaxation of the doctrine.

There are several other situations where exceptions have been deemed desirable. Under the decision of *Erie v. Tompkins*,[29] the Circuit Court of Appeals would, in a decision such as the *Cadillac* case, follow the New York Court not only by choice but by duty. After *Erie v. Tompkins* the Federal courts were required to apply state law in all matters of common law and state statutory interpretation. The fact that a state rule of law changes between the first and subsequent appeal of a case in Federal court is not sufficient to require the Federal court to change its decision.[30]

A similar situation arises where an appellate court of a state has rendered a decision, and subsequently, but before final appeal the highest court of the state has reached a different conclusion.[31] The law of the case should not be applied on subsequent appeal in the face of intervening higher, contrary authority.

One of the most often recognized exceptions is where, since the first decision was rendered, the same court in a different case, or cases, has decided the same question differently. A strict application of the doctrine would require that upon second appeal the law of the case should prevail, and the rule of law in the first decision would apply to the parties in the case, regardless of the intervening decisions stating an opposite rule for different parties. There are jurisdictions, however, making an exception to the rule in this situation, and altering the decision on second appeal to conform with their own intervening decisions.[32] The Missouri court, which has been one of the jurisdictions giving the rule a discretionary application, stated this exception in *Hamilton v. Marks*,[33] as follows:

"When a rule has been adjudged upon mature deliberation . . . it ought to be considered as finally determined . . . . [C]ogent and convincing reasons must exist to induce a re-examination of what ought to be considered *res judicata*. But in view of the fact that subsequent decisions of this court, though not noticing or professing to overrule the decision in this case, are . . . inconsistent with it . . . it is deemed advisable to depart from the usual practice and consider the question again."[34]

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[29]304 U. S. 64, 114 A. L. R. 1487 (1938). This case had changed the rule announced in Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865 (U. S. 1842), under which federal courts could decide matters of common law independently of the views of state courts.

[30]Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 548 (1943).

[31]In Missouri this policy is directed by constitutional provision. Wolf v. Dwelling House Ins. Co., 86 Mo. App. 581 (1900).

[32]Meyers v. Ditmar, 47 Tex. 373 (1897). See Note (1919) 1 A. L. R. 1267, 1274, and note 34 *infra* for other cases.

[33]63 Mo. 167 (1876).

[34]*Id.* at 172. *Contra*, Jenkins v. Southern R. Co., 145 S. C. 161, 143 S. E. 13 (1928); see (1929) 7 N. C. L. Rev. 60. The plaintiff sought to take advantage of the subsequent law stated in Johnson v. Southern R. Co., 142 S. C. 125, 140 S. E. 919 (1927). The court refused, saying that the matter was *res judicata* and the law of the case.

The policy of ending litigation would seem a very abstract principle to the unsuccessful litigant, who had lost his case through error of the court, and who realized that the erroneous law applied only to him and to no one else, even though others might occupy exactly his position. Yet, in jurisdictions giving the doctrine a strict *res judicata* application, this is the result.[35]

A very similar exception is expressed in *Underwood v. City of Caruthersville,*[36] where it was said that "this rule is not without exceptions. Our Supreme Court has repeatedly reconsidered questions adjudicated upon former appeals . . . and especially has this been the case where the former ruling inadvertently overruled and nullified a statute, or overruled some sound and well settled principle of law."

Still another exception is discussed in *Hastings v. Foxworthy.*[37] When a case is remanded generally for a trial *de novo,* and the same general questions are presented on the second trial, the appellate court is not bound to follow the opinion on the first appeal if it is considered manifestly erroneous. The distinction made in this case was that the doctrine was limited to rulings formerly made on points distinctly presented for decision. When a case is wholly remanded for new trial, and not for any point or points distinctly made on the former hearings, the rule does not apply to the extent of preventing a re-examination by the appellate court.[38]

The Doctrine in Mississippi

With few exceptions,[39] Mississippi has consistently stated that the rule is to be applied with the strictness and finality of *res judicata.*[40] An examination of many of the cases shows that the court, although stating a

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[35]*Cf.* Johnson v. Success Brick and Machinery Co., 104 Miss. 217, 61 So. 178 (1913), discussed *infra* note 42.

[36]63 N. W. at 958. The court indicates a justification for the strict application of the doctrine, on the theory that after the mandate the appellate court loses jurisdiction over the case, and questions decided leading to the judgment and mandate constitute a final adjudication.

[37]45 Neb. 676, 63 N.W. 955 (1895).

[38]63 N.W. at 962.

[39]Pennington v. Purcell, 155 Miss. 554, 125 So. 79 (1929); Commercial Bank and Trust Co. v. Dendy, 149 Miss. 512, 176 So. 590 (1928); Brewer v. Browning, 115 Miss. 358, 76 So. 267 (1917).

[40]Cochran v. Latimer, 111 Miss. 192, 71 So. 316 (1916); Supreme Lodge K. P. v. Hines, 109 Miss. 500, 68 So. 485 (1915); Johnson v. Success Brick and Machinery Co., 104 Miss 217, 61 So. 178 (1913); New York Life Ins. Co. v. McIntosh, 46 So. 401 (Miss. 1908); Knutt, Adm'r, v. Knutt, 84 Miss. 465, 36 So. 689 (1904); Still & Still v. Anderson, 63 Miss. 545 (1886); Swan v. Smith, 58 Miss. 358 (1881); Smith v. Elder, 14 S. & M. 100 (Miss. 1850); Green v. McDonald, 13 S. & M. 445 (Miss. 1850). See also, dissenting opinion in Brewer v. Browning, 115 Miss. 358, 76 So. 267 (1917).

strict application of the rule, was usually satisfied with the former opinion.[41] However, the case of *Johnson v. Success Brick and Machinery Co.*[42] illustrates the rigid application of the rule in the Mississippi court, in that the former decision was held final despite the court's dissatisfaction with it. The court, in fact, declared the former holding an incorrect application of the law. The case involved release of a surety on a note, and in the former opinion the court allowed his release under circumstances disapproved in the second decision. Despite its dissatisfaction with the decision the court nevertheless adhered to its expressed views as being the law of the case. It was further stated that counsel for appellee had convinced the court that it was in error in its former opinion, but failed to convince it that it did not previously "decide the precise point now presented for decision." The court's decision was:

> "The principles controlling the law of the case we think are necessarily more binding upon the courts than the law of precedent. If the trial court is permitted to ignore the decision of the case by the appellate court when it is reversed for a retrial according to the law as interpreted by the appellate court the rights of litigants can never be finally determined. It is of the greatest importance that litigation shall have some finality. It is infinitely better that a case be wrongly decided than to never decide it. It is impossible to distinguish what this court decided before from what we are now called upon to decide upon this appeal."[43]

As to the rule of law in the case, it was held applicable to the parties in the particular case, yet expressly changed for the future. This is a striking illustration that the policy of ending litigation was the sole consideration.

In the case of *Brewer v. Browning,*[44] the doctrine was stated as less strict. The majority opinion said that the rule was not absolute and did not preclude a complete reversal of opinion upon subsequent appeal if the former opinion "after mature consideration is erroneous and wrongful, and would lead to unjust results." The rule, as modified, was stated:

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[41]Reily v. Crymes, 176 Miss. 133, 168 So. 267 (1936) (former decision correct); Reed v. Norman-Breaux Lbr. Co., 149 Miss. 395, 115 So. 724 (1928) (former decision correct); Kellog v. King, 114 Miss. 375, 75 So. 134 (1917) (former conclusion considered sound); New York Life Ins. Co. v. McIntosh, 46 So. 401 (Miss. 1908) (law of case applies whether right or wrong, but court considers former decision right). Also, there are cases stating that strict application is to be made of the doctrine, yet it does not apply for other reasons. H. & C. Newman, Inc. v. Delta Grocery and Cotton Co., 144 Miss. 887, 110 So. 686 (1926) (Statement on principles of law was *dictum,* because case was only appealed on pleadings); Bates v. Strickland, 139 Miss. 636, 103 So. 432 (1925) (case materially different on second appeal.)

[42]104 Miss. 217, 61 So. 178 (1913).

[43]*Id.* at 219-220, 61 So. at 179.

[44]115 Miss. 358, 76 So. 267 (1917).

> "Where the facts are the same and where there has been no change of conditions or situation as that a change of decision would work wrong and injustice, the court may, on the subsequent appeal, correct its former decision where it is manifestly wrong."[45]

The situation in the case was that the blood relatives of a child adopted in Kentucky were allowed to inherit to the exclusion of the adoptive mother's heirs, and in the subsequent appeal, the court changed its former adjudication and allowed the mother to inherit, adopting the interpretation of the law of the case as stated above. There was a strong dissenting opinion by Smith, C. J., who argued that the law of the case was very much like *res judicata,* both being policies to end litigation and prevent vexation, and that the object of the doctrine was to cut off any inquiry into the matter, right or wrong.

He contended that the rule of inheritance in the former decision was correct, and pointed out that no precedent existed or was shown to allow the mother to inherit. He claimed that the opinion of the majority of the judges was based upon "the attempt to administer what they call natural justice, losing sight altogether of the universal rule that the right of inheritance was purely legal and unless conferred by law does not exist."[46] He further stated that even though the doctrine were given the interpretation stated by the majority opinion, this was not the proper case to apply its rule, because the correct law had been applied upon first appeal.

Of the five on the court,[47] two joined in the dissenting opinion, giving well-considered views. This would seem to indicate that at best there was mere diversity of opinion, rather than manifest error, under which circumstances it is doubtful that the doctrine should be relaxed.

In *Commercial Bank and Trust Co. v. Dendy,*[48] the same interpretation of the doctrine was stated but the court refused to change the ruling of the former decision because it was considered correct. In restating the rule it was said that the former decision would not be disturbed unless it was not only manifestly wrong, but also mischievous, or hurtful. The only difference in the application in this case and the *Browning* case, is that the court wished to retain its decision in the former and change its decision in the latter.

When the doctrine is given any interpretation other than a strict *res judicata* one, the matter becomes discretionary. In exercising this discre-

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[45]*Id.* at 364, 76 So. at 269.
[46]*Id.* at 383, 76 So. at 276.
[47]Judge Cook recused himself.
[48]149 Miss. 512, 176 So. 590 (1928).

tion, a standard must be created. The Missouri Court has given a summary of the problem in *Mangold v. Bacon,* as follows:[49]

"The general rule . . . is that legal conclusions announced on a first appeal . . . become and remain the law of the case. . . . But there are exceptions to the rule as well recognized as the rule itself. Those exceptions evidence a flexibility adjusting the rule to needs of refined justice by the exercise of a high and discriminating judicial power. We owe a duty to enforce the exceptions as well as the rule. . . . Whether from grace or right, when cogent and convincing reasons appear, such as lack of harmony with other decisions and where no injustice or hardship would flow from a change, or where by inadvertence principles of law have been incorrectly declared the first time, or mistake of fact has been made, or injustice to the rights of parties would be done by adhering to the first opinion, then the exceptions to the rule have play, and it is our duty to re-examine and correct our own errors in the second appeal in the same case."

Julian P. Alexander, Jr.

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[49]237 Mo. 496, 141 S. W. 650, 653-655 (1911).

REAL EVIDENCE IN MISSISSIPPI

I. In General

There is perhaps no phrase in legal terminology so frequently used as the phrase "real evidence," so frequently employed in a general and vague sense, and which is used so often, by men learned in the law, without a due regard to precision in its application. The term "real evidence" has been the subject of much debate[1] and any number of words have been used at times, such as demonstrative, autoptic, natural, illustrative, pictorial, and physical. Professor John H. Wigmore in his treatise on the law of evidence[2] quotes Best[3] in which he defines real evidence, or "Autoptical Proference," as: ". . . Where the thing which is the source of the evidence is present to the senses of the tribunal." Still others[4] elaborate the undeniable: "such evidence as is addressed directly to the senses of the court or jury without the intervention of the testimony of witnesses, as where various things are exhibited in open court." The presentation of this evidence is a mode of enabling the court to reach a conclusion through the *sense* of actual sight, hearing,[6] or taste.[7] Some argument has been raised as to whether the senses of smell and feel may properly be used in the process of determining what is real evidence, and this question has never been definitely settled. It is, in general, a "visible" object, offered to the senses of the tribunal, which may furnish a ground of inference, and, which may enable the court to reach more accurate conclusions respecting issues in the case.[9]

II. Relevancy, Emotional Exhibitions, and Common Sense Limits to Probative Force

Obviously, the value of this type of evidence lies in the fact that what one sees or hears will furnish him a much better test of truth, and will enable him to reach more accurate conclusions respecting issues in the case, than will result from the testimony of another. "The eyes of the members of the jury must be presumed to be as good as those of witnesses generally."[10]

There is little doubt as to the admissibility of evidence of this nature, if and when it meets certain standards. Whether such evidence shall be

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[1]See Phipson, *Real Evidence* (1920) 29 Yale L. J. 705.
[2]1 Wigmore, Evidence (3d ed. 1940) § 24.
[3]Best, Evidence (1893) §§ 196, 197.
[4]32 C.J.S., Evidence, § 601.
[5]Production in court is one of the essential features.
[6]Commonwealth v. Clark, 123 Pa. Super. 277, 187 Atl. 237, 240 (1936).
[7]People v. Kinney, 124 Mich. 486, 83 N.W. 147 (1900).
[8](1932) 78 A.L.R. 435, 439; (1931) 10 Tex. L. Rev. 107; and (1925) 35 Yale L. J. 232.
[9]Thayer, A Preliminary Treatise on Evidence at the Common Law (1898) 263.
[10]3 Jones, Evidence (2d ed. 1926) § 1398.

received and admitted to the jury is one for judicial decision. To be admitted it must, of course, be both relevant and highly probative. But, what is and what is not "relevant and highly probative" is not an easy question. And, just where, the perturbed judge might well ask, must the line be drawn and held? Professor Wigmore, for one, emphatically states, "there can never be a question as to the relevancy of the thing itself, autoptically produced."[11] Others[12] are not so sure. Unquestionably it rests in the discretion of the court to deny applications for the production of real evidence in cases where the order would cause great inconvenience, or where, for other reasons, it is unjust. Thus, in *Grangers' Life Insurance Co. v. Brown*,[13] the court refused to order the exhumation of a body, although the defendant, an insurance company, claimed that the deceased had made admissions that he had in childhood received a severe injury to the skull which could only be proven by an examination. The court felt, under the circumstances, that "it would be a proceeding repugnant to the best feelings of [the court's] nature, and likely to be in many cases so abhorrent to the sensibilities of the surviving relatives that they would prefer an abandonment of the suit to a compliance with the order." The extent to which the court may go in allowing the use of physical objects is not defined by any absolute rule or rules. The trial court's ruling as to the admissibility of the evidence has generally been upheld, unless an abuse of its discretion is clearly apparent.

While this type of evidence is readily recognized as the best, there is anyone of a dozen situations or possible consequences which will necessitate its exclusion by the trial judge. If the object be indecent or offensive to the sensibilities, and can be established by other evidence, it will be excluded.[14] So too will it be rejected if, in his opinion, the judge thinks it will prejudice, confuse, or mislead the jury, as by unduly exciting antipathy or sympathy.[15] Cumbersomeness[16] or insufficiency might also defeat the exhibition of such evidence.[17] However, it should be borne in mind that, regardless of the above definite limitations and ever present potential disadvantages, the dangers of the use of such evidence are small in comparison with the advantages which might be had.[18] Occasionally, there are objections raised in some quarters to the oftentime impossibility of presenting the physical object to a court of review.[19] It

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[11] 4 WIGMORE, EVIDENCE (3d ed. 1940) § 1151.
[12] 32 C.J.S., EVIDENCE, § 602.
[13] 57 Miss. 308, 314, 34 Am. Rep. 446, 447 (1879).
[14] *Ibid.*
[15] TOMPKINS, EVIDENCE (2d ed. 1936) § 633.
[16] In Dillard v. State, 58 Miss. 368 (1880), it was thought impracticable to bring a horse into the room where the court was sitting, and the court held in such case that the examination by the jury need not necessarily be had in the courtroom, so long as it was under the direction of the court and in the presence of the parties.
[17] 32 C.J.S. EVIDENCE § 602.
[18] *Ibid.*
[19] See TOMPKINS, *op. cit. supra* note 15 at § 632.

is argued that the evidence gained by inspection cannot easily be reported for consideration by an appellate court.[20] To be practical, however, why could not the judge simply dictate into the record what he sees before him? This would certainly help the appellate court, and should find popular acceptance by most judicial bodies.

Another principle which may prohibit autoptic proference is the principle of "privilege," protecting the plaintiff suing for *corporal injury* who is unwilling to furnish evidence. In *Yazoo & Mississippi Valley Railway v. Robinson,*[21] Mr. Justice Cook stated the Mississippi rule when he held that the circuit court has no power either by statute or the common law, to require the plaintiff in an action for damages for personal injury, to submit to a physical examination by physicians appointed by the court. The courts of this state never compel one party to submit his body or any part thereof to inspection unless he first waive the "privilege" by voluntary exhibition. Thus it was held, in *Dixie Greyhound Line v. Matthews,*[22] where the plaintiff, a child, exhibited her hips and certain X-ray pictures to the jury in order that an injury to the pubic bone might be shown, that this action constituted a waiver of the privilege and physicians might be appointed to examine her body and make a reasonable examination in the presence of the plaintiff's physicians. Likewise, in *Teche Lines v. Bounds,*[23] where the plaintiff pointed to his eye to illustrate his testimony of injury to it this waived the privilege.

III. Exhibition of Person or Object

A. Race or Color, Resemblance of Features, Paternity

The eligibility of any real evidence depends on the admissibility of the fact to be shown by inspection. In most instances this is the real question. For example, a person's color has always been regarded as some evidence of race ancestry. The question of the color of a person is a matter respecting which the court may often obtain knowledge from observation; therefore, the production of a person to ascertain his color as relevant for this purpose is proper. In *Garvin v. State,*[24] where the indictment described the accused as a "colored person," the court thought that fact might be proved by "ocular" demonstration, and "profert" of the party was sufficient if it satisfied the jury of that fact. Mr. Justice Chalmers, in delivering the opinion of the court, thought this evidence proper inasmuch as, "under certain circumstances jurors may use their eyes as well as their ears."

Resemblance of features, as evidence of paternity in cases of bastardy or rape, is evidence concerning which the tribunal may well exercise its

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[20] Ilhinger v. State, 53 Ind. 251 (1876).
[21] 107 Miss. 192, 65 So. 241 (1914).
[22] 177 Miss. 103, 170 So. 686 (1936).
[23] 182 Miss. 638, 179 So. 747 (1938).
[24] 52 Miss. 207 (1876).

sense of perception. That there is a conflict existent as to the eligibility of this type of evidence is borne out by three lines of authorities: (1) That a child is not admissible in evidence except when the question of race or color is involved. (2) A child is admissible in evidence when the trial court in its discretion is of the opinion that the child is of sufficient age to have developed family resemblances if any there be. (3) A middle ground taken by some courts that, if there is some evidence of specific resemblances between the child and the putative father, then the child is admissible in evidence,[25] for comparison by the jury of those traits of similarity only respecting which testimony has been admitted.[26]

Mississippi, in following the second of these three rules held, in *Gillis v. State,*[27] where the profert of a child four and one-half months old was offered in evidence to prove the paternity of the appellant in a prosecution for statutory rape, that the offer of this evidence was insufficient to support a conviction inasmuch as "a baby of that tender age could not . . . have developed such characteristics as to make such testimony dependable and reliable . . . upon which to base the judgment of a court." In *Welford v. Havard,*[28] it was held not error in the trial court to permit profert of the child to the jury. Likewise, it was so held in *Smith v. Hawkins,*[29] in accordance with "the overwhelming weight of authority." In our only other case anywhere in point, *Johnson v. Walker,*[30] Judge Houston was robbed of the opportunity of passing thereon when the plaintiff's counsel immediately directed that the child be removed from the courtroom. No later profert of the child was made to the jury, nor offered to be made, and no reference thereto was made by either counsel in the presence and hearing of the jury.

B. Identity

Where the identity of a person or thing with another in issue may be proved by inspection and it is relevant, it will be admitted, and when so established it will require strong proof to the contrary to overcome it. Care, however, should be exercised that the submission is not objectionable as tending to influence unfairly the minds of the jurors or prejudice them against the accused. In *Keeton v. State,*[31] a prosecution for murder of deceased whose body was dismembered after she was killed, it was held competent to admit evidence of fatty substances, shoes and stockings, and blood stains found in the home of the deceased to show not only the *corpus delicti,* but the criminal agency of defendant. In *Powell v. State,*[32]

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[25]In Mississippi, the child may be simply shown to the jury without any formal profert. See 4 WIGMORE, *op. cit. supra* note 11 at 1154.

[26]State v. Anderson, 63 Utah 171, 224 Pac. 442, 40 A.L.R. 94 (1924).

[27]152 Miss. 551, 553, 120 So. 455 (1929).

[28]127 Miss. 88, 89 So. 812 (1921).

[29]93 Miss. 588, 47 So. 429 (1908).

[30]86 Miss. 757, 39 So. 49 (1905).

[31]175 Miss. 631, 167 So. 68 (1936).

[32]61 Miss. 319 (1883).

on the trial of a party for stealing a hog, a portion of the animal stolen was produced before the jury for the purpose of identification. After the jury had retired they sent a written request to the judge, that the piece of flesh produced on the trial should be sent to the jury-room for further scrutiny. The judge complied with the request, and the Supreme Court held that this was not error. And in *Rose v. State*,[33] where decedent's clothing at the time of killing was admitted in evidence without objection in a murder prosecution, it was held no error in permitting the jury to take the garments introduced in evidence into their consultation room.

The clothes worn by the accused at the time of the commission of the crime may also be produced for inspection by the jury. In *Hunter v. State*,[34] a prosecution for homicide, it was held admissible to introduce in evidence blood-stained garments, found in the possession of one of the defendants, although no scientific test had been made to determine whether it was human blood or animal blood. Likewise, in *Cody v. State*,[35] boots and shoes taken from the defendants after their arrest were held admissible in evidence. The articles were carried to the place of the killing and found to fit precisely into the tracks there. "The shoes had a loose tack on one heel, and this projecting nail or loose tack caused the shoe to make a peculiar impression. The corrugations had worn off one of the soles of the boots, but the other was corrugated."

In *Illinois Central Railroad v. Humphries*,[36] in an action for the death of a brakeman allegedly killed by coming in contact with cinders containing clinkers alongside the track, the admission by the trial court in evidence of clinkers which a witness testified were like the ones in the cinders along the track was not error. Also, in *Dixon v. State*,[37] it was held admissible to admit in evidence two packages of money, and two checks which were found on the floor near the body of the deceased and which had blood on them, inasmuch as the purpose of submission was to identify this money as having been in the possession of the defendant on the night of the homicide.

Authenticated fingerprints may be introduced in evidence and compared with other fingerprints found at or near the scene of a crime in order to prove identity by correspondence or similarity.[38] In *Willoughby v. State*,[39] Mr. Justice McGowen took judicial notice that "the evidence of fingerprint identification has, for a long time, been recognized by the courts of the country as admissible in evidence in order to establish the identity of a party where the comparison of a developed fingerprint with that of the party alleged to have made it is shown. . ."

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[33]170 Miss. 550, 155 So. 341 (1934).
[34]137 Miss. 276, 102 So. 282 (1924).
[35]167 Miss. 150, 148 So. 627 (1933).
[36]170 Miss. 840, 155 So. 421 (1934).
[37]164 Miss. 540, 143 So. 855 (1932).
[38]20 AM. JUR., EVIDENCE, § 725.
[39]154 Miss. 653, 659, 122 So. 757, 759 (1929).

The authorities are in conflict as to the competency of evidence as to the trailing of persons by bloodhounds. The majority view appears to be that such evidence is admissible, provided that such preliminary proof be given of the quality and training of the dogs as to show that reliance may reasonably be placed upon their accuracy in following the trail of a human being.[40] "The authorities admitting bloodhound evidence vary somewhat as to the requisite preliminary proof required, depending on the character, training, and experience of the bloodhounds and the conditions and circumstances of each particular case."[41] In *Harris v. State*,[42] it was held improper to admit such evidence, although the fact that the bloodhounds trailed the defendant from a track at or near the place where the person who committed the crime must have stood is a circumstance indicating that the crime was probably committed by the accused. The court, in this instance, thought that such evidence could be admissible *only* after preliminary proof that the bloodhounds were pure bred, and trained to track human beings, and were reliable, and that the track where the bloodhounds started was made by the person committing the crime. On the other hand, such evidence was held admissible in *Spears v. State*,[43] an earlier holding, upon testimony that bloodhounds of pure blood, trained to track human beings and in the control of an experienced trainer, were put on the trail at the place where the criminal agency had its origin, and followed it to the home of accused and identified him.

C. Weapons and Apparatus

"When articles of an inanimate character have to do with the issues in an action either as themselves the subjects of dispute or as evidential of facts in dispute, they are generally admitted."[44] For example, a knife or other weapon found at the scene of the crime is admissible. As illustrations of this class of cases, the following will serve: In *Wilkinson v. State*,[45] in an action for infanticide, it was competent to prove that the defendant produced a case knife with no sign of blood on it from her bed; in *Fairley v. State*,[46] a murder prosecution, the offer of the shotgun which was found on the roadside near the scene of the killing as evidence was good upon testimony that the accused was directly connected with the evidence in issue.

A still,[47] kegs,[48] and ginger containers,[49] which are found on the defendant's premises, are admissible in evidence on the trial of persons arrested for possession thereof.

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[40]HUGHES, EVIDENCE (3d ed. 1907) § 10, at 183.
[41]ABBOTT, EVIDENCE (5th ed. 1937) § 624.
[42]143 Miss. 102, 108 So. 446 (1926).
[43]92 Miss. 613, 46 So. 166, 16 L.R.A. (N.S.) 285 (1908).
[44]MCKELVEY, EVIDENCE (4th ed 1932) § 293.
[45]77 Miss. 705, 27 So. 639 (1900).
[46]163 Miss. 682, 138 So. 330 (1931).
[47]Kennedy v. State, 139 Miss. 579, 104 So. 449 (1925).
[48]Boatwright v. State, 143 Miss. 676, 109 So. 710 (1926).
[49]Prine v. State, 158 Miss. 435, 130 So. 687 (1930).

In a rather unusual case, *DeSilva v. State,*[50] an action for assault and battery, the defendant sought to offer as evidence several obscene postal cards written in the prosecutrix's hand-writing to the defendant's daughter, but they were refused by the trial court. However, upon review, it was held error to exclude the cards inasmuch as they were the cause of the trouble. (It was "not disputed," argued counsel for appellant, "that the Harvey woman struck Madame DeSilva first and knocked her down.")

D. Present Condition

"The present condition of an object offered may not be the same as at the time in issue, nor so nearly the same as to be proper evidence of its former condition; accordingly, autoptic proference is allowable only on the assumption that the condition is now the same or sufficiently similar."[51] "It must appear, as a preliminary to the introduction of any object in evidence, that it has not sustained any substantial change by reason of lapse of time or otherwise, since the time in issue."[52] In *Self v. State,*[53] it was stated by Mr. Justice Whitfield that, upon a trial for manslaughter, a portion of the skull of the deceased is not admissible in evidence, where it has been buried for a long time and the evidence does not clearly show that it is in the same condition that it was in at the time of burial. In the case of *Triplett v. State,* [54] it was held that, in a murder trial, the clothing worn by the deceased at the time of the killing is admissible in evidence if it is in substantially the same condition as when it was taken from the body.

IV. Experiments

Experiments or demonstrations made before the jury may, in the court's discretion, be allowed if they are made under similar conditions and like circumstances as those existing at the time of the event sought to be demonstrated.[55] Experimental evidence should include both tests conducted in court and testimony concerning experiments conducted outside of court. "It may happen that it is impracticable to bring an animal into the room where the court is sitting, and in such cases the examination by the jury need not necessarily be had in the courtroom, so long as it is under the direction of the court and in the presence of the parties."[56]

In *Dillard v. State,*[57] the jury, in a case of homicide, were permitted to inspect the horse which the deceased was riding at the time he received

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[50] 91 Miss. 776, 45 So. 611 (1907).
[51] 4 Wigmore, *op. cit. supra* note 11 at § 1151.
[52] 20 Am. Jur., Evidence, § 719.
[53] 90 Miss. 58, 43 So. 945, 12 L.R.A. (n.s.) 238 (1907).
[54] 159 Miss. 365, 132 So. 448 (1931).
[55] Tompkins, *op. cit. supra* note 15 at § 646.
[56] 3 Jones, *op. cit. supra* note 10 at § 1400.
[57] 58 Miss. 368 (1880), cited *supra* note 16.

his death-wounds, and to make experiments (". . . and one of them got on him, while another stood on the ground with a knife and experimented . . .") with the view of ascertaining whether the wounds could have been inflicted by a man standing on the ground. On the other hand, in *Gulf, Mobile & Northern Railroad Co. v. Kelly,*[58] a suit by an employee against the railroad for injuries sustained when an acetylene torch exploded, the court refused to permit the defendant to carry on an experiment with the torch outside of the courtroom. The defendant railroad moved the court to allow it to make a test demonstration of the torch outside the courthouse, in the presence of the jury, stating that it would not be necessary to go more than 50 feet from the courthouse, and that the experiment could be made in 20 or 30 minutes. The plaintiff objected thereto, and the court sustained the objection. Upon review, the Supreme Court of this state held that such holding was not error, where there was proof that the explosion might occur under one circumstance and not under another, and where the torch had been in the possession of the defendant from the time of the explosion until the trial. In addition, the court further held experiments outside the courtroom should never be authorized unless it be shown beyond reasonable doubt that conditions at the time of trial are identical with those at the time of the injury and each party has proper opportunity to ascertain facts before the experiment is made.

Our Mississippi court thought it improper, in *Moorman v. State,*[59] a trial for murder, for the prosecuting attorney to lay the son of deceased upon the floor and use him as a model to demonstrate to the jury the range of the bullets and how the wounds were inflicted, since this would tend to "unduly arouse the sympathy of the jury for the family of deceased."

Evidence of experiments made by witnesses out of court may, in certain instances, be admissible. However, this is a matter which rests largely in the sound discretion of the trial court.[60] In *Lurenberger v. State,*[61] a prosecution for selling intoxicating liquor, evidence that the cider purchased by the witnesses from the defendant made them drunk was admissible for the "legitimate" purpose of proving the drink's intoxicating quality. In an action for the death of a child run over by the defendant's passenger train, *Harrison v. Southern Railway,*[62] evidence of experiments made by witnesses at the place of the accident at the same time of day and under similar climatic conditions, tending to show the distance at which a child the same size as the one killed could be seen on the track, should have been admissible.

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[58]178 Miss. 531, 171 So. 883 (1937).
[59]109 Miss. 848, 69 So. 1000 (1915).
[60]HUGHES, *op. cit. supra* note 40 at § 5, at 180.
[61]74 Miss. 379, 21 So. 134 (1897).
[62]93 Miss. 40, 46 So. 408 (1908).

In still another case, *Brown v. State*,[63] a prosecution for homicide wherein the question of self-defense was in issue, it was held no abuse of judicial discretion to admit experimental evidence (pattern of gun-fire) made by a witness to determine the distance of the accused from the deceased, inasmuch as the experiment was made under circumstances substantially similar to the conditions existent at the time the shot was fired. Finally, in *Fore v. State*,[64] a murder trial, a series of photographic representations of *tableaux vivants* carefully arranged by the chief witness for the state was introduced in evidence. It seems that the witness went to the scene of the killing with a photographer and placed a buggy, with a man in it, in position in which he (the witness) said the deceased was when he was shot. He then put a man in the position where he said the accused was. He had the buggy, the two men, and the wagon photographed. It was error to admit such evidence, thought the Supreme Court in this instance, inasmuch as the photographs in issue were no more than mere artistic reproductions of situations planned by the witness, although taken at the place of the homicide. "That they were hurtful to the prisoner cannot be doubted."

V. Photographs, X-Rays, and Motion Pictures

It is a common practice today to receive in evidence photographs,[65] X-ray plates,[66] and moving-pictures as aids to the jury in arriving at an understanding of the evidence, the situation, the condition, or the circumstances. "The value of such evidence lies in its being a correct representation or reproduction of the original, and it is thus clearly necessary that the draftsman . . . or photographer who produced it shall testify not only to its production, but as well to the circumstances under which it was produced."[67] Generally speaking, the determination of the relevancy of a photograph is left to the sound discretion of the trial judge, and his ruling will not be disturbed on appeal unless an abuse of discretion is shown.[68]

After a photograph has been verified and admitted in evidence, the jury should determine what credit or weight, or conclusiveness, is to be given it as evidence. In *Mobile & Ohio Railroad v. Bryant*,[69] an action on a death resulting when an automobile was struck by a train at a village crossing, an important issue was whether the crossing was of the type known as "much traveled or crowded," so as to entitle the deceased to more warning of the approach of the train than he actually received. In reversing a judgment for plaintiff the court said: ". . . . [T]here are five

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[63]176 Miss. 448, 169 So. 837 (1936).
[64]75 Miss. 727, 738, 23 So. 710, 712 (1898).
[65]M. & A. Motor Freight Lines v. Villere, 190 Miss. 848, 1 So. (2d) 788 (1941).
[66]Dixie Greyhound Lines v. Matthews, 177 Miss. 103, 170 So. 686 (1936). See Note (1937) 9 Miss. L. J. 388.
[67]Tompkins, *op. cit. supra* note 15 at § 643.
[68]LeBarron v. State, 107 Miss. 663, 65 So. 648 (1914).
[69]159 Miss. 528, 536, 132 So. 539, 541 (1931).

photographs, taken on the day of the accident . . . which disclose beyond any doubt that this crossing is not within the class to be termed much used, frequently used, or crowded, as the law understands those terms in the connection here involved. These photographs disclose the facts to us by way of demonstration and we apply the law to the facts thus demonstrated—any verdict to the contrary notwithstanding."[70] Recently it has been held,[71] that a photograph may be manifestly so clear and so near a perfect reproduction, down to the slightest material detail, and so obviously taken from the proper camera position, as to warrant the court in ruling that it is a conclusive demonstration of the physical facts disclosed by it. In this case action was brought to recover for the death of a brakeman who was struck by a cattle guard while riding on the side of a box car. The defendant introduced some posed photographs reconstructing the accident that were held to be conclusive demonstrations of the physical facts disclosed by them, precluding plaintiff's recovery.

A. Ordinary Photographs of Persons, Places, or Things

A photograph, for example, may be introduced in evidence after it has been shown by preliminary testimony that it is a true representation of the place as it existed at the time of the commission of the crime or tort.[72] So also, the fact that photographs of the scene of an industrial accident were taken after a change in the physical situation at the scene is wholly immaterial, and no objection to their admission in evidence, where the change is not misleading and the difference between the photographs and the exact situation at the time of the accident is pointed out and explained by the verifying witnesses.

In *Gulfport Fertilizer Co. v. Bilbo,*[73] an employee's action, the court felt there was no error in refusing to admit a certain photograph as evidence, where the mass of material in a bin at the time the photograph was taken was not the same as that contained therein at the time of the employee's injury, and, where the jury could easily form a clear conception of the size and type of bin without the aid of photographs. Nevertheless, it was held that the photograph should have been admitted to show the size and condition of the bin, in view of the fact that the photograph correctly represented the bin itself, and that counsel for the other side request that it be admitted, although its exclusion did not constitute re-

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[70]"While this case is in keeping with the modern tendency to hold that accurate photographs of some subjects come within the incontrovertible physical facts rule, it is submitted that the photographs here involved were not of a type that should be considered conclusive. . . In view of the fact that a still picture shows the scene only as of one particular moment, it is doubtful that still pictures should be considered conclusive evidence of the extent of traffic at an intersection or railroad crossing." SCOTT, EVIDENCE (1942) § 676.

[71]Favre v. Louisville & N. R. R., 180 Miss. 843, 178 So. 327 (1938).

[72]LeBarron v. State, 107 Miss. 663, 65 So. 648 (1914).

[73]178 Miss. 791, 174 So. 65 (1937).

versible error. Likewise, in *Wheat v. Teche Lines,*[74] in an action for injuries sustained when a passing bus threw particles of slag into the plaintiff's eye as he was standing by his truck on the highway, the court thought that photographs of the highway where the accident occurred were improperly admitted in evidence in the absence of any showing that they approximately represented the condition of the highway as it existed at the time of the injury. It is error, the court said, to admit a photograph in evidence when there is no evidence identifying it or proving its accuracy.

B. Posed Photographs

There is a divergency of opinion in this country as to the admissibility of posed photographs showing other persons or objects relocated at the scene of the crime in the positions of the participants or objects according to the testimony of witnesses.[75] In Mississippi, however, it is fairly well settled that it is reversible error to admit in evidence a posed photograph of the scene of a homicide. In an early Mississippi case[76] the state introduced in evidence a photograph showing a buggy with a man sitting in it, representing deceased in the attitude he was in when shot and also showing a man representing the defendant—both positioned according to directions of a witness for the state. The appellate court said: "The photographs and all the evidence touching them should have been excluded. . . . The effect, if not their purpose, was by photographic process, to strengthen and bring out in striking and captivating fashion the version of the difficulty as given the jury in this witness' evidence."

This case is followed in a later Mississippi case, *Brett v. State,*[77] wherein it was held reversible error to admit in evidence a photograph taken from the spot where deceased stood according to testimony of some of the state's witnesses, which picture showed two of the state's witnesses in the spots they claimed to have occupied and showing a man representing defendant—the purpose of the photograph being to prove that the state's witnesses represented in the picture were in a position to see the homicide.

On the other hand, posed photographs reconstructing an accident to a railroad worker have been held admissible in this state.[78]

C. Fingerprints

It is elementary fact that the fingerprints of no two persons are identical in their markings; therefore, when two fingerprints are found to be identical, the fact is established that they are the fingerprints of one and

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[74]181 Miss. 409, 179 So. 553 (1938).
[75]Scott, *op. cit. supra* note 70 at § 692.
[76]Fore v. State, 75 Miss. 727, 23 So. 710 (1898), cited *supra* note 64.
[77]94 Miss. 669, 47 So. 781 (1908).
[78]Favre v. Louisville & N. R. R. Co., 180 Miss. 843, 178 So. 327 (1938), cited *supra* note 71.

the same person. Accordingly, photographs of fingerprints found at the scene of a crime are admissible in evidence for comparison with the fingerprints of the accused. Such photographs are usually introduced in evidence by the prosecution as evidence of the defendant's guilt,[79] but, in one unusual Mississippi case,[80] the accused offered a photograph of some fingerprints found on a bottle involved in the crime to prove that the fingerprints were not his. It was held, however, that since there was proof that there were other fingerprints on the bottle which were not photographed by the defendant, the fact that those photographed were not his own was certainly not sufficient to show his absence from the scene of the crime; and, therefore, the photograph was not admissible.

D. X-Ray Pictures

In view of the fact that the art of photography by the X-ray process is no longer a "new discovery," but has passed beyond the experimental stage, it has generally been admitted in evidence by trial courts throughout the country as a new aid in the administration of justice.

Of course X-ray pictures are not admissible in evidence without preliminary proof of their accuracy. It should be shown that the apparatus used in making the picture was of a type known to produce dependable results and was in good working condition, and there should be testimony that the person who took the picture was qualified by training and experience to take accurate X-ray pictures of the human body.[81] "X-ray pictures, like photographs, maps, and diagrams, when material, are admissible on authentication which satisfies the court that the thing or person is fairly portrayed." So said the Supreme Court in *Gulf Research Development Co. v. Linder,*[82] holding that X-ray photographs were admissible in evidence. The question of the competency of X-ray pictures is a preliminary one, and is addressed to the sound discretion of the court.[83]

In most states the courts usually are regarded as having inherent power to order a physical examination of an injured person for the purpose of determining the nature and extent of personal injuries.[84] "Where this power is recognized it is discretionary with the court whether the plaintiff shall be compelled to submit to an X-ray examination, including the taking of X-ray photographs."[85] In Mississippi, which has no statute on the subject, it is held that the power to order an X-ray examination exists only when the plaintiff waives her personal immunity to examination by exhibiting the injured parts of her body to the jury. This action waives the privilege of personal immunity so that physicians may be ap-

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[79]Scott, *op. cit. supra* note 70 at § 799.
[80]Willoughby v. State, 154 Miss. 653, 122 So. 757 (1929), cited *supra* note 39.
[81]Scott, *op. cit. supra* note 70 at § 799.
[82]177 Miss. 123, 132, 170 So. 646, 648 (1936).
[83]*Ibid.*
[84]See 25 C.J.S., Damages, § 174.
[85]Scott, *op. cit. supra* note 70 at § 810.

pointed to examine the body and make a reasonable examination in the presence of the plaintiff's physicians.[86] In *Tonkel v. Yazoo & Mississippi Valley Railroad,*[87] a personal injury action, it was held that X-ray pictures taken for an injured party's physician were a part of the information acquired by the physician in attending the patient and could not be used or referred to by the opposing side under the privilege of communications between physician and patient. There was no issue of "waiver" involved in this instance.

"A photograph that is otherwise admissible is not rendered objectionable merely because marks or notations are written on it, provided (1) the writing is a pertinent expression of fact that is devoid of evidential value when considered apart from the photograph, and provided (2) some witness explains the writing and verifies its correctness."[88] The second proviso of the rule is especially true of technical inscriptions. Thus photographic marks and data made to identify a picture with its subject usually require the testimony of the photographer.[89] For example, in *Beard v. Turritin,*[90] the technician who made an X-ray picture of the plaintiff's back and spine identified it by taking the stand and asserting that the person of whom she made the picture gave her name as Mrs. Turritin, that after taking and developing the picture she (the witness) wrote thereon the following data in identification thereof: "Mrs. Turritin, 7/16/34, ribs and spine, Kings Daughters Hospital, 2189, right side, Gulfport"; that for the purpose of identification she placed the same data on an envelope and then placed the picture in it and filed it in the hospital file of X-ray pictures. By these marks of identification, this witness positively identified the picture which was then offered in evidence as being the picture she took. She was unable to identify the plaintiff at the trial as being the same person as the original of the picture, but in view of the manner in which she identified the picture, it was held that the trial court committed no error in admitting it in evidence. It is hardly possible that any one other than the technician could have testified concerning the identification marks.

E. Motion Pictures

The same basic principles which govern the admission in evidence of still pictures govern the admission of motion pictures.[91] Accordingly, when relevant and material and when verified, motion pictures are admissible in evidence. Indeed, in many cases motion pictures not only may have a bearing upon the facts but may be absolutely decisive of the is-

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[86]Dixie Greyhound Lines v. Matthews, 177 Miss. 103, 170 So. 686 (1936), cited *supra* note 66.

[87]170 Miss. 321, 154 So. 351 (1934).

[88]Scott, *op. cit. supra* note 70 at § 637.

[89]*Ibid.*

[90]173 Miss. 206, 161 So. 688 (1935).

[91]McGoorty v. Benhart, 305 Ill. App. 458, 27 N.E. (2d) 289 (1940).

sues involved in the action; and when this is true, their exclusion will constitute reversible error. Thus where a plaintiff claims that he is physically incapable of working, it is reversible error to refuse to admit in evidence a motion picture taken some time after his injury showing him doing road construction work. In *Metropolitan Life Insurance Co. v. Wright*,[92] an action on a disability policy, motion pictures of insured showing him worked on a highway shoveling gravel for the Works Progress Administration were offered in evidence. Subsequently, there was an irreconciliable conflict between the two litigants upon the question of the nature of the work. According to insured's evidence, "the work was of a light character, requiring but little exertion." According to the evidence for the insurer, to the contrary, "it was heavy work, with pickaxe and shovel." Regardless, the court held this type of evidence admissible, where the picture was taken by a competent motion picture photographer with a camera of standard make in good condition. When this appears to the satisfaction of the trial judge, there would seem to be no sound reason to prevent its acceptance in evidence. "Evidence," said Judge Smith, "by means of motion pictures exhibited to a trial jury, while novel, is admissible when the accuracy with which they will reproduce the scenes photographed is proven,—somewhat like the accuracy of an ordinary photograph is proven."

VI. Documents

As a general proposition, the jury may examine a document as an aid in determining whether it is genuine or counterfeit; whether it contains an alteration, erasure, or mutilation. "Comparison of handwritings is a mode of proof of the authenticity or genuineness of a writing, by comparing the handwriting thereof with a specimen proved or admitted to have been written by the person whose authorship of the questioned document is in controversy."[93] Where an issue is raised of the genuineness of a signature to an instrument, proof of the genuiness of the signature may be made by a comparison with other writings of the same person, which are admitted to be genuine specimens and which are submitted to the court and jury to enable them to determine the question by their own observation and judgment.[94]

Many states have statutes permitting the introduction of irrelevant papers with signatures attached, for the purpose of comparing them with the signature in dispute. However, Mississippi has no such statute. In English practice, comparison of the disputed writing with genuine written instruments was limited to relevant papers containing the signature which was properly a part of the record. In the case of *Wilson v. Beauchamp*,[95] our court, recognizing the English rule, extended the common law, and

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[92] 190 Miss. 53, 63, 199 So. 289, 291 (1940).
[93] 32 C.J.S., Evidence, § 612.
[94] 20 Am. Jur., Evidence, § 742.
[95] 50 Miss. 24, 32 (1874).

held as follows: "And while comparison of handwriting by the jury is restricted in the English practice to writings put into the case for other purposes, it allowed in the American states to put in the genuine signatures written before the controversy arose, for the mere purpose of enabling the jury to judge by comparison." Accordingly, it was held in *Harrison v. Eagle Lumber Co.*,[96] an action to recover on a note, "that writings shown to be genuine are admissible in evidence for the purpose of comparison with a disputed writing, either by witnesses on the stand or by the jury, without the intervention of witnesses." On the other hand, in *Coleman v. Adair*,[97] another action on a note, where the question whether the maker's signature was genuine was the main point in issue, it was held error to instruct that the jury might compare certain signatures of the maker, proved to be genuine, with the signature in dispute, and determine for themselves whether the signature in dispute was "similar" to the other signatures.

In an early Mississippi case, *Moye v. Herndon*,[98] it was held that the opinion of an expert is competent evidence to go to the jury, on an issue involving the genuineness of a written instrument, although such expert be unacquainted with the handwriting of the writer of the instrument. In the same opinion, the court called attention to the fact that such evidence is intrinsically weak, and ought to be received and weighed by the jury with great caution.

VII. View

Where the object concerning which the controversy exists cannot be produced in Court because it is immovable or inconvenient to remove, it is the common practice for the jury to go to the object in its place and there observe and inspect it.[99] The power of the trial court in this state, in respect to permitting such action, is conferred by statute, and it is regarded as one which the presiding judge is to exercise at his discretion. In *Great Atlantic & Pacific Co. v. Davis*,[100] an action for personal injuries allegedly resulting from a defective store floor, it was stated that the court has discretion to permit the jury to view the premises, but where no reason is shown for the view, it is reversible error to grant it. In that case Mr. Justice Griffith had this to say: ". . . a view must be of essential aid, not merely of some aid, and . . . this must be made to appear as reasonably certain . . . ," so that "a view is allowable only when the alleged necessity therefor 'in order to reach the ends of justice' bears some fair relation by way of equivalency, in that interest, to the right which otherwise would be unhampered and unimpaired to have the verdict reviewed on the record evidence."

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[96] 152 Miss. 466, 475, 119 So. 203, 205 (1928).
[97] 75 Miss. 660, 23 So. 369 (1898).
[98] 30 Miss. 110 (1855).
[99] 4 WIGMORE, *op. cit. supra* note 11 at § 1162.
[100] 177 Miss. 562, 569, 171 So. 550, 552 (1936).

There may be instances where a trial court should not grant a view of premises where it would be expensive, or cause delay, or where a view would serve no useful purpose. Accordingly, it was held in *Yazoo & Mississippi Valley Railroad v. Lamensdorf*,[101] an action for the death of a motorist killed at a railroad crossing, that where the scene of the accident can be disclosed by photographs, diagrams, and measurements, the jury should not be permitted to view the scene. Likewise, it was held in *Gordon v. State*,[102] where an engineer testifying for the accused produced a diagram drawn by him to scale, the accuracy of which was not challenged, that a later request for a view by the court and jury at the scene of the homicide was properly denied, in the absence of any possibility that a view could have given the jury any more definite information than did the diagram. The presiding judge may refuse to permit a view where he is satisfied that there has been a substantial change or alteration in the subject of the inspection.[103].

In *City of Meridian v. Moody*,[104] a motorist's action against the city for injuries sustained when her automobile came in contact with a rope stretched across the street, the Supreme Court upheld the trial court's denial of the city's request to permit the jury to view the site of the accident, since the conditions were not the same at the time of the trial as at the time of the injury. The accident occurred on June 30, 1937; and the trial was had in April, 1938. "In the intervening time," the court thought, "the scene had changed, conditions were no longer as at the time the injury was sustained, and to view the scene would have been useless, and possibly hurtful." On the other hand, it was held in *Mississippi Power Co. v. McCrary*,[105] an action for the wrongful death of a truck driver killed in an automobile collision, that permitting the jury to view the scene of the accident was within the court's discretion, notwithstanding changes in the situation since the time of the accident, which were not such as to interfere with the jury's determining at what point the drivers of the colliding automobiles could see each other.

Our Supreme Court has held that only testimony which will point out the place and information necessary to understand the location is admissible at the scene. In *Jones v. State*,[106] where the court removed itself away from the courthouse for the purpose of viewing the scene of the homicide, the defendant's rights were prejudiced when testimony was given at such place in an effort to prove the defendant's guilt, rather than to point out the scene of the homicide and elicit information necessary to understand the location being examined.

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[101]180 Miss. 426, 177 So. 50 (1937).
[102]188 Miss. 708, 196 So. 507 (1940).
[103]See Yazoo & M. V. R. Co. v. Lamensdorf, 180 Miss. 426, 177 So. 50 (1937), cited *supra* note 101.
[104]185 Miss. 340, 349, 186 So. 649, 651 (1938).
[105]179 Miss. 427, 176 So. 165 (1937).
[106]141 Miss. 894, 107 So. 8 (1926).

At this date there is no longer any serious doubt either as to the admissibility or importance of "real" evidence in Mississippi. Real evidence is constantly in use in the courts; it is a familiar practice today to supplement other proof by presenting for the inspection of the judge or jury objects to which the testimony refers.

Obviously, there are some common sense limits to the probative force of this type of evidence. Human feelings, sympathy or indignation, are easily excited by the exhibition before the jury of ghastly wounds, bloody clothes, or other objects which appeal to the senses. Nevertheless, real evidence is the most natural and the most efficient of all evidence and is accepted by the courts of this state as possessing some evidential value.

Emile Gex, Jr.